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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1932

No. 559

CITY OF HARRISONVILLE, MISSOURI, PETITIONER,

vs.

W. S. DICKEY CLAY MANUFACTURING COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

PETITION FOR CERTIORARI FILED DECEMBER 19, 1932.

CERTIORARI GRANTED JANUARY 16, 1933.

(37,256)

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Pleas and proceedings in the United States Circuit Court of Appeals for the Eighth Circuit, at the May Term, 1932, of said Court, before the Honorable Kimbrough Stone and the Honorable William S. Kenyon, Circuit Judges, and the Honorable William A. Cant, District Judge.

Attest: E. E. KOCH,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

(Seal)

Be it Remembered that heretofore, to-wit: on the thirtieth day of June, A. D. 1931, a transcript of record pursuant to an appeal allowed by the District Court of the United States for the Western District of Missouri, was filed in the office of the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, in a certain cause wherein the City of Harrisonville, Missouri, was Appellant and W. S. Dickey Clay Manufacturing Company was Appellee, which said transcript as prepared and printed under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its Clerk, is in the words and figures following, to-wit:

a

Citation.

In the District Court of the United States for the Western Division of the Western District of Missouri.

W. S. Dickey Clay Manufacturing Company, Plaintiff,
No. 1201. vs. In Equity.
City of Harrisonville, Missouri, a municipal corporation, and Missouri Pacific Railroad Company, Defendants.

United States of America—ss.

To W. S. Dickey Clay Manufacturing Company—Greeting:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Eighth Circuit to be holden at St. Louis, Mo., on the 15th day of November in the year nineteen hundred and thirty, pursuant to an order allowing an appeal filed in the clerk's office of the District Court of the United States for the Western District of Missouri, from a final decree signed, filed and entered on the 10th day of July, 1930, in that certain suit therein, being in equity No. 1201 wherein City of Harrisonville, Missouri, appellant is defendant and you are plaintiff and appellee, to show cause, if any there be, why the decree rendered against the said appellant, as in said order allowing appeal mentioned, should not be corrected and why justice should not be done to the parties in that behalf.

Witness the Honorable Merrill E. Otis, United States District Judge for the Western District of Missouri, this 8th day of October, 1930.

MERRILL E. OTIS,
U. S. District Judge for the Western District of Missouri.

In the absence of Judge Reeves from the Western Division and at his request.

Service of above paper acknowledged this 8th day of October, 1930.

WINGER, REEDER, BARKER,
GUMBINER & HAZARD,
Attorneys for Appellant.

Endorsed: Filed in U. S. District Court on Oct. 8, 1930.

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1 United States of America—Sct.

Be it remembered that heretofore, to-wit, at the regular April term of the United States District Court for the Western District of Missouri, and on the 31st day of August, 1928, there was filed in the office of the Clerk of said Court a Petition in the cause wherein W. S. Dickey Clay Manufacturing Company is plaintiff and City of Harrisonville, Missouri, a Municipal Corporation, and Missouri Pacific Railroad Company, a Corporation, are defendants, being cause No. 1201 In Equity.

Said Petition, filed August 31, 1928, is in words and figures as follows, to-wit:

2 Petition.

Comes now the plaintiff and states:

1. That it is a corporation duly authorized and existing under and by virtue of the laws of the State of Delaware, and that it is a citizen and resident of the State of Delaware and is not a citizen and resident of the Western Division of the Western District of Missouri; that the defendant City of Harrisonville, Missouri, is a municipal corporation and a city of the fourth class under and by virtue of the laws and statutes of the State of Missouri; that the defendant Missouri Pacific Railroad Company is a railroad corporation duly authorized and existing under and by virtue of the laws of the state of Missouri.

2. That this is a suit between citizens of different states and that the value of the matter in controversy herein exceeds the sum of $3,000.00 exclusive of interest and costs.

3. That the plaintiff is the owner of certain lands lying and situate within the Western Division of the Western District of Missouri in Cass County, Missouri, described as follows, to-wit:

That tract of land being at a point four (4) Chains and Three (3) Links North of the Southeast corner of the West Half (W. ½) of Lot Five (5) of the Northeast Quarter (N. E. ¼) of Section Five (5), Township Forty-four (44), Range Thirty-one (31); thence in a Northwesterly direction along the North line of the lands of Adolph Carlson (see Book 127, page 49, Recorder's Office) to the East side of the right of way of the Kansas City and Southern Railroad (now Frisco); thence in a Northeasterly direction along the East side of the right of way of said railroad to the North line of said Lot Five (5) of the Northeast Quarter (N. E. ¼) of said Section; thence East along said North line to the West side of the right of way of the Missouri Pacific Railroad; thence in a Southerly direction along the West side of the right of
3 way of said last named railroad to where said line crosses the East line of the West Half (W½) of said Lot Five (5); thence North to the place of beginning, excepting therefrom the right of way of the Missouri, Kansas and Texas Railroad;

That tract of land beginning on the South line of Lot Five (5) of the Northeast Quarter (N. E. ¼) of Section Five (5) Township Forty-four (44) Range Thirty-one (31), where said line intersects the West line of the right of way of the Missouri Pacific Railway, thence with said right of way line Northwardly about Two Hundred Seventy-three (273) Feet to the Southern line of land belonging to W. H. Shackelford, thence with said Shackelford's line Northwestwardly One Hundred Forty-seven (147) Feet, thence Southwardly about Three Hundred Twenty-five and Five Tenths (325.5) Feet to a point on the South line of said Lot Five (5) which point is One Hundred Forty-seven (147) feet West of the point of beginning, thence Eastwardly with the South line of Lot Five (5) aforesaid, One Hundred Forty-seven (147) feet to beginning, and containing Ninety-three Hundredths (.93) of an Acre;

The East Half (E. ½) of the West Half (W½) of Lot Four (4) of the Northeast Quarter (N. E. ¼) of Section Five (5) Township Forty-four (44), Range Thirty-one (31), except right of way of railroad;

All that part of the East Half (E½) of the West Half (W-½) of Lot Three (3) of the Northeast Quarter (N. E. ¼) of Section Five (5), Township Forty-four (44), Range Thirty-one (31), which lies West of the right of way of the L. & S. Division of the Missouri Pacific Railway, containing Fourteen and Seventy-one Hundredths (14.71) Acres, more or less, in Cass County, Missouri;

All that part of Lot Two (2) of the Northeast Quarter
4 (N. E. ¼) of Section Five (5) which lies West of the Lexington and Southern Branch of the Missouri Pacific Railroad;

Also, commencing at a point on the South line of said Lot Two (2), which is Eight Hundred (800) Feet East of the East line of the right of way of said Railroad, thence North Eight Hundred (800) Feet, thence West to a point in the East line of said right of way which is Eight Hundred (800) Feet North of the South line of said Lot Two (2) aforesaid, thence in a Southerly direction along the East Line of said right of way to the South line of said Lot Two (2), thence East Eight Hundred (800) Feet to the beginning; all in Township Forty-four (44), Range Thirty-one (31);

Beginning at a point Seven Hundred and Seventy (770) Feet West from the Southeast corner of Lot Two (2) of the Northwest Quarter (N. W. ¼) of Section Five (5), Township Forty-four (44), Range Thirty-one (31), running thence East Seven Hundred Seventy (770) Feet, to the Southeast corner of said Lot Two (2), thence North Eight Hundred Fifty (850) Feet, thence in a Southwesterly direction to place of beginning, and containing Seven and one-half (7½) Acres, more or less;

All of Lot One (1) of the Northwest Quarter (N. W. ¼) of Section Five (5) Township Forty-four (44), Range Thirty-one (31) except a tract described as follows:

Beginning at the Southeast corner of the West Half (W. ½) of said Lot One (1), of the Northwest Quarter (N. W. ¼), running thence North Twenty (20) Rods, thence South Twenty (20) Rods, thence East Sixteen (16) Rods to the beginning, and known as Glenn Burial Ground;

Beginning on the West Line of Lot One (1) of the Northeast Quarter (N. E. ¼) of Section Five (5), Township Forty-four (44), Range Thirty-one (31), at a point One Hun-
5 dred (100) Feet South of the Northwest corner of said Lot One (1) running thence North to the Northwest corner of said Lot, One (1), running thence East along the North line of said Lot One (1), a distance of Three Hundred (300) Feet, running thence on a straight line in a Southwesterly direction to the point or place of beginning, containing Thirty-four Hundredths (.34) of an Acre, more or less;

All that part of Lot One (1) of the Northeast Quarter (N. E. ¼) of Section Five (5), Township Forty-four (44),

Range Thirty-one (31) lying East of the right of way of the Missouri Pacific Railroad;

Beginning at the Northwest corner of Lot One (1) of the Northwest Quarter (N. W. ¼) of Section Four (4), Township Forty-four (44), Range Thirty-one (31), running thence South Eighty Rods, thence East Ten and Five-tenths (10.5) Rods, thence North Eighty (80) Rods, thence West ten and five-tenths (10.5) Rods to the beginning and containing Five and Twenty-five Hundredths (5.25) Acres, more or less;

The North Half (N. ½) of the Northeast Quarter (N. E. ¼) of the Southeast Quarter (S. E. ¼) of Section Five (5), except Two (2) Acres in the Southwest corner thereof, Sixteen (16) Rods East and West by Twenty (20) Rods North and South; and

The West Five (5) Acres of the North Half (N. ½) of the Northwest Quarter (N. W. ¼) of the Southwest Quarter (S. W. ¼) of Section Four (4), all in Township Forty-four (44), Range Thirty-one (31);

The South Sixty (60) Acres of the West Half (W. ½) of the Southwest Quarter (S. W. ¼) of Section Four (4), in Township Forty-four (44), of Range Thirty-one (31).

6 4. That the right-of-way of the defendant Missouri Pacific Railroad Company runs through and over plaintiff's said land.

5. That the said land is farm and pasture land; that a water-course runs through the said land, known as Town Creek; that prior to the things and matters charged against the defendants herein, the waters of said water-course were clear, sweet, pure and unpolluted and entirely fit for consumption as drinking water by man and beast; that the said water-course meanders through a large part of the plaintiff's said farm, to-wit, about 150 acres thereof, which constituted and were prior to the things and matters charged against the defendants herein, a creek pasture of great value to the plaintiff herein; that the said creek pasture was formerly used for the grazing of blooded cattle and other livestock of great value and worth.

6. That said Town Creek is a small water-course which in seasons of drouth becomes all but dry except a few pools along the course; that, however, the normal flow of said stream and the water in said pools would be, except for the things and matters charged against the defendants herein, sufficient for

the requirements of plaintiff in its uses of the land through which the said creek runs.

7. That plaintiff's said creek pasture lies immediately West of the said right-of-way of the defendant Missouri Pacific Railroad Company; that at one point in the meanderings of said Town Creek, the said creek runs within a foot or so of the West line of the said right-of-way; that immediately opposite said point and within a few feet of the East line of said right-of-way the defendant City of Harrisonville has constructed and maintains a tank for the reception and collection of sewage; that the said City of Harrisonville is a city of over 2,000 inhabitants and that the sewage from the sanitary sewer mains, lines and pipes in said city is carried to the said tank.

8. That the said tank is of the type known as "Imhoff". The process of sewage disposal in such a tank is as follows: The raw sewage flows into two settling compartments of the tank so constructed that a percentage of the solids in the sewage will settle into a third and lower compartment of the tank in which a process of digestion and decomposition takes place. This third compartment is referred to as the sludge or digestion compartment. As this last mentioned compartment fills with the decomposed and decomposing solids from the sewage, it is from time to time emptied out into an open bed referred to as a sludge bed, where it is spread out to dry. From time to time the dry sludge from this bed must be removed to make room for new supplies from the sludge or digestion compartment of the tank. The liquid and solid sewage matter which does not settle into the compartments of the tank are not subjected to any further treatment but are simply discharged from the tank into such outlet as may be provided. The foregoing is a brief statement of the normal operation of any Imhoff tank.

9. An Imhoff tank is a method of primary sewage disposal. Such a tank is not supposed to remove in excess of sixty per cent of the putrescible organic matter in sewage and the effluent from such a plant or tank when discharged will, unless subjected to further treatment, putrefy, emit noxious gases, odors and fumes, injurious to both animal and vegetable life, and will when passed into a small water-course like the aforesaid Town Creek, so pollute and contaminate, the same that its waters are unfit for consumption by man or beast.

10. The effluent from such a primary disposal process as the Imhoff tank should be subjected to further and
8 secondary treatment. This may be done in several ways, of which examples are the sprinkling filter system or the activated sludge plant system. In either of these secondary disposal methods a process of oxidation of the putrescible organic sewage matter is so completed that the effluent will be stable and may be discharged into a watercourse without polluting or contaminating the same so as to render the water unfit for consumption and without creating noxious gases, odors and fumes injurious to animal and vegetable life. There are also other adequate methods of secondary sewage disposal. Furthermore, within a mile or so of the City of Harrisonville and within less than five miles thereof, there is the Grand River, a stream of sufficient volume and size to adequately handle, care for and dispose of the effluent from the city's sewage system without creating the nuisance conditions hereinafter alleged.

11. In constructing the aforesaid Imhoff tank at the point aforesaid, the City of Harrisonville, with the consent and permission of the defendant Missouri Pacific Railroad Company, carried and piped the effluent from said tank underneath the railroad embankment of the said Railroad Company, so that the effluent from said tank discharges onto the west side of said railroad right-of-way at the point aforesaid at which the said Town Creek comes to within a foot or so of the said right-of-way. At this point of discharge the topography is such that the discharge must and does flow immediately and directly into the said creek; that the defendants are encroaching and trespassing upon the lands of the plaintiff and have taken, ruined and destroyed said water-course for the uses and purposes of the same to which plaintiff is entitled, and have impaired and destroyed the value of plaintiff's land without right or authority of law, and the said defendant municipal corporation has and is attempting to take
9 the plaintiff's private property or to damage the same for public use without just compensation in violation of Section 21, Article 2, and Section 30 Article 2 of the Constitution of Missouri and of Article 5 and Section 1 of Article 14 of the Amendments to the Constitution of the United States.

12. The defendants are creating and maintaining a nuisance to the special and peculiar injury and damage of the plaintiff as follows, to-wit:

(a) The said Imhoff tank and sludge drying bed, comprising the only disposal plant now operated by the defendant city, are of insufficient size to give the results which should be obtained from such a plant of proper size, functioning normally under reasonable operating conditions.

(b) The said Imhoff tank is not properly operated in that weeds to the height of three feet, grass and tomato plants are allowed to grow in the sludge bed, thereby interfering with the operation of the air and sun in the process of drying the sludge; also grass is allowed to grow on the dry scum in the gas vent at the top of the sludge or digestion compartment of the tank.

(c) The sludge accumulations in the tank are excessive, as shown by the rising of gas bubbles in the settling compartments.

(d) The sewage accumulated in said tank becomes highly septic and emits strong odors of hydrogen sulphide and other noxious odors, gases and fumes.

(e) The sludge bed on which sludge from the tank is discharged to dry is grossly inadequate in size and area.

(f) The sludge or digestion compartment of the tank into which solids settle from the settling compartment is insufficient in size and capacity to take care of the normal sewage flow from the said city.

(g) By means of a by-pass a large amount of sewage and a high percentage of the total sewage from said city is not carried through the Imhoff tank at all but is simply carried around the tank and discharged directly into the said creek at the outlet point aforesaid without having been subjected to any purification process whatsoever.

13. By reason of the improper construction, operation and maintenance of the aforesaid Imhoff tank, and by reason of the failure and refusal of the said city to construct and maintain more than a primary disposal system for its sewage, and by reason of the failure and refusal of the city to construct, maintain and operate proper and adequate secondary disposal facilities for its sewage, a nuisance is created at and by the said Imhoff tank and in the said water-course running through plaintiff's land in that noxious odors, gases and fumes arise from the said tank and from the said stream polluting the air on and about the plaintiff's farm for a distance of three-quarters of a mile from the said tank and

the said stream; the waters of said stream are polluted and contaminated and are made milky colored in parts and black in others; solid sewage matter is plainly visible in the waters, gas bubbles are constantly emitted from the stream, sewage collects into pools which become black, slimy and odorous; these conditions obtain not only at and near the sewage outlet, but for a great distance down the water-course.

14. By reason of the foregoing, the value and worth of a large part of plaintiff's pasture lands lying along the said water-course is completely destroyed, cattle and other live-stock will not remain in the vicinity of the stream on account of the noxious odors, vapors and gases emitted therefrom, the water is unfit for consumption. The plaintiff has
11 no other water supply for its said pasture land, so that the value and worth of the same have been and will be, during the continuance of the said nuisance, wholly destroyed. The air and atmosphere not only in the vicinity of the stream but also for the distance of three-quarters of a mile therefrom, and in and about the dwelling house located upon said land is polluted and contaminated with noxious odors, vapors and gases so that the ease, comfort, health and life of persons residing in and upon and working on said land are endangered and jeopardized.

15. Plaintiff states that the aforesaid conditions and the nuisance created thereby have been brought to the attention of the defendant City of Harrisonville and the defendant Missouri Pacific Railroad Company, and that requests and demands have been made upon them to remedy the same but that they have wilfully failed and refused to do so, that the defendant city has ample power and authority under and by virtue of the laws of the State of Missouri, to construct, maintain and operate an adequate sewage disposal plant as aforesaid, but that it continues to fail and refuse to do so and allows the aforesaid nuisance to continue, and that the defendant Railroad Company acquiesces in and permits the same and actually participates therein as aforesaid.

16. That by reason of the aforesaid nuisance and all of the things and matters charged against the defendants herein, and by reason of the loss of the use, occupation and enjoyment of the plaintiff's aforesaid pasture land, and by reason of the discomfort, annoyance, suffering and jeopardy to life and health occasioned by the aforesaid odors, gases, vapors and smells created by the said nuisance in and upon the plaintiff's said land, and by reason of the labor and expense

involved in restoring said watercourse to a pure and proper condition, the plaintiff has been and is damaged in the
12 sum of Twenty-five Thousand ($25,000.00) Dollars.

17. That the plaintiff has no adequate remedy at law for the grievance aforesaid, and in order to avoid a multiplicity of suits invokes the jurisdiction of a court of equity; that plaintiff will suffer irreparable injury and damage unless further maintenance of the nuisance aforesaid is enjoined.

Wherefore, the plaintiff prays judgment against the defendants, and each of them, in the sum of Twenty-five Thousand ($25,000.00) Dollars, and that the defendants, and each of them, be perpetually enjoined from the discharge into the said watercourse upon the plaintiff's land of raw sewage and/or of the effluent from an improper, inadequate and insufficient sewage disposal plant, and that the defendant City of Harrisonville be given a reasonable time to construct and place in operation a sufficient and adequate sewage disposal plant or to make such other disposal of its sewage as may be necessary and proper, and for such other and further relief as to the court shall seem meet and proper.

WINGER, REEDER, BARKER,
GUMBINER & HAZARD,
Attorneys for Plaintiff.

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13 Separate Answer of Defendant, City of Harrisonville.

Now comes the defendant, City of Harrisonville, Missouri, and for its separate answer herein admits that it is a municipal corporation, a city of the fourth class, under and by virtue of the laws and statutes of the State of Missouri, but denies that the value of the matter in controversy exceeds the sum of Three Thousand ($3,000.00) Dollars, exclusive of interest and costs.

This defendant further admits that plaintiff is the owner of the real property described in the plaintiff's petition and admits that the right-of-way of defendant, Missouri Pacific Railroad Company, runs through and over plaintiff's said land. This defendant further admits that the said land is pasture land and that a water-course runs through said land known as Town Creek, but this defendant denies that prior to the construction and operation of the sewer system in question, the waters of said watercourse were clear, sweet, pure and unpolluted or fit for consumption as drinking water

by human beings. And this defendant denies that the creek in question has been of great value to the plaintiff.

This defendant admits that said Town Creek in seasons of drouth becomes all dry except a few pools along the course, but this defendant denies that the normal flow of said stream and the water [is] said pools would be sufficient for the requirements of plaintiff in its uses of the land through which the creek runs.

This defendant admits that the creek and pasture in question lies immediately west of the right-of-way of the defendant Missouri Pacific Railroad Company, and that at one point in the meanderings of said Town Creek the same runs within a foot or so of the west line of the said right-of-
14 way, and admits that substantially opposite this point and within a few feet of the east line of the right-of-way of the defendant, Missouri Pacific Railroad Company, this defendant has constructed and is maintaining certain portions of its sewer system which serves the City of Harrisonville, a city of over two thousand (2,000) inhabitants. And this defendant further admits that the disposal tank thus located is of the type known as "Imhoff," but denies that any solid matter is discharged into the outlet of said tank and denies that any of the effluent from such tank putrefies or emits noxious gas odors or fumes injurious to animal or vegetable life and denies that when the same is passed in to the said Town Creek it so pollutes and contaminates the same that it is unfit for consumption by man or beast, and denies that said effluent should be subjected to further and secondary treatment, and denies that it is practicable for the City of Harrisonville to conduct its sewage to the Grand River.

This defendant further admits that discharge from said tank in question is carried by pipes under the right-of-way of the Missouri Pacific Railroad Company and discharge on the west side of said railroad right-of-way at a point within a foot or two of said right-of-way into the said Town Creek and that the same does flow into said creek, but this defendant denies that it is encroaching and trespassing upon the lands of the plaintiff or has taken, ruined or destroyed said water-course for the normal purposes thereof or has impaired or destroyed the value of plaintiff's land, and this defendant denies that it has or is attempting to take plaintiff's private property or to damage the same for public use without just compensation to the plaintiff and denies that it is creating or maintaining any nuisance to the special and peculiar injury or damage of the plaintiff.

15 This defendant further denies that the construction, operation and maintenance of said Imhoff tank is in any way improper. And this defendant denies that it has polluted the said stream or has polluted the air about the plaintiff's farm for a distance of three-quarters of a mile from said point or for any other distance, and this defendant denies that the value and worth of plaintiff's pasture lands lying along said water-course has been completely destroyed and denies that cattle or other livestock will not remain in the vicinity of said stream on account of the alleged noxious odors and gases, and denies that the water is unfit for the consumption of said cattle, and denies that plaintiff has no other water supply for said pasture land and denies that the health and life of persons residing in or working on said land are in any way endangered or jeopardized in the maintenance of said sewer plant.

And this defendant denies that the plaintiff has been damaged in the sum of Twenty-five Thousand ($25,000.00) Dollars or any other sum, and denies that plaintiff is without any adequate remedy at law for the alleged injury and denies that this is an action within the jurisdiction of the court of equity, but alleges that this is an effort by the plaintiff herein to combine an action in law with an action in equity, and denies that there is any justification for such character of action.

Wherefore, this defendant prays that it may go hence with its costs.

ALLEN B. GLENN,
RAYMOND G. BARNETT,
Attorneys for defendant, City of Harrisonville, Missouri.

Received copy of the above answer this 25th day of September, 1928 and consent given that same may be filed not later than Sept. 26, 1928.

WINGER, REEDER, BARKER,
GUMBINER & HAZARD,
Attorneys for plaintiff.

Filed in the United States District Court, Sept. 26, 1928.

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16 Separate Answer of Missouri Pacific Railroad Company.

1. Now comes the defendant, Missouri Pacific Railroad Company, and denies knowledge of the facts averred in

Paragraph 1 of said petition, except that it admits that the defendant, City of Harrisonville, is a municipal corporation and a city of the fourth class, and admits that the defendant, Missouri Pacific Railroad Company is a railroad corporation organized and existing under the laws of the State of Missouri.

2. This defendant denies knowledge of the facts averred in Paragraph 2 of said petition.

3. This defendant denies knowledge of the facts averred in Paragraph 3 of said petition.

4. This defendant admits that it owns a railroad right-of-way which adjoins parts of the lands described in the plaintiff's petition.

5. This defendant denies knowledge of the facts averred in Paragraph 5 of plaintiff's petition.

6. This defendant denies knowledge of the facts averred in Paragraph 6 of plaintiff's petition.

7. This defendant denies knowledge of the facts averred in Paragraph 7 of plaintiff's petition except this defendant admits that there is a pasture west of defendant's right-of-way and a creek runs up to the defendant's right-of-way line, and that the said city of Harrisonville has constructed and maintains a tank for the reception and collection of sewage, and admits that the City of Harrisonville is a city of over Two Thousand inhabitants, but avers that it is a city of less than thirty thousand inhabitants.

8. This defendant denies knowledge of the facts averred in Paragraph 8 of the plaintiff's petition.

9. This defendant denies knowledge of the facts
17 averred in Paragraph 9 of said petition.

10. This defendant denies knowledge of the facts averred in Paragraph 10 of plaintiff's petition.

11. This defendant denies knowledge of the facts set forth in Paragraph 11 of the plaintiff's petition.

This defendant avers that the City of Harrisonville is and was at all of the times mentioned in the plaintiff's petition, a city of less than thirty thousand inhabitants; that the legislative body of said city did pass an ordinance declaring that it deemed it necessary to construct a sewer system, public or district sewer, to facilitate the proper drainage of such city; that in pursuance of said ordinance said City of Harri-

sonville did duly adopt plans, specifications and profile showing the points of intersection of such sewer with defendant's railroad right-of-way; also the grade of the bottom of the sewer, its breadth and depth, with a general statement of the materials to be used in its construction, and thereupon said city caused a copy of said plans, specifications and profile and general statement aforesaid to be served on this defendant; that in accordance therewith and in compliance with Section 8787 of the Revised Statutes of Missouri for 1919, this defendant was obligated to give its consent to and permit said City to construct the said sewer under this defendant's right-of-way at said place. This defendant further avers that it has no control whatever of the management or operation of said sewer nor any part thereof, but the said sewer is in the sole possession, custody and operation, and is maintained by the said City of Harrisonville for the benefit of its inhabitants to facilitate the proper drainage of said City.

12. This defendant denies knowledge of the facts averred in Paragraph 12 of the petition except that it says that if there be any nuisance maintained, as averred in said petition, it was not maintained by this defendant but is maintained solely by the City of Harrisonville, Missouri.

13. Defendant denies knowledge of the facts averred in Paragraph 13 of the petition.

14. Defendant denies knowledge of the facts averred in Paragraph 14 of the petition.

15. Defendant denies knowledge of the facts averred in Paragraph 15 of the petition, except that defendant admits that the plaintiff made complaint to this defendant about said sewer, but this defendant explained to the plaintiff that this defendant had no interest or control, in any degree in the maintenance and operation of said sewer, and had no power to prevent the said City from passing the same under its tracks and right-of-way and of maintaining the same, inasmuch as the said City of Harrisonville, in so doing, was exercising a right conferred upon the said city by the statutes of the State of Missouri.

16. Defendant denies knowledge of the facts averred in Paragraph 16 of plaintiff's petition.

17. Defendant denies knowledge of the facts averred in Paragraph 17 of plaintiff's petition.

Wherefore, this defendant asks to be discharged with its costs.

HACKNEY & WELCH,
Attorneys for defendant, Missouri Pacific Railroad Company.

Filed in the United States District Court Sept. 29, 1928.

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19 (Decree, July 10, 1930.)

This cause came on to be further heard at this term and was argued by counsel and thereupon upon consideration thereof it was ordered, adjudged and decreed as follows:

1. The Court finds the issues upon the plaintiff's bill of complaint in favor of the plaintiff and against the defendants.

2. The Court finds that the effluent from the sewage system and the sewage disposal plant of the defendant City of Harrisonville is discharged into Town Creek, a watercourse flowing through and upon the land of the plaintiff; that such effluent pollutes and contaminates said Creek [endering] it filthy and creating in said Creek and upon and over the land of the plaintiff noxious and offensive odors; that by reason of the discharge of said effluent into the said watercourse a nuisance is created in said watercourse in and upon plaintiff's land.

3. The Court finds that it is unnecessary for the defendant City of Harrisonville to discharge raw or partially treated sewage into the said watercourse upon plaintiff's land, and that the defendant City may by use of reasonable means available to said defendant city abate the said nuisance, and that six months time from the date of this decree is a reasonable time within which the said defendant city may abate said nuisance.

4. The Court finds that by reason of the said nuisance and the continuance thereof to date plaintiff has been damaged by loss of rents and profits from its said land in the sum of five hundred dollars ($500.00) and by reason of the cost and expense of restoring said Creek to the condition in which it existed prior to the creation of said nuisance by said defendant city in the sum of Three Thousand Five Hundred Dollars ($3,500.00).

5. The Court finds that the defendant Missouri Pacific
20 Railroad Company is a proper party defendant by reason of the fact, which the Court finds, that the defend-

ant City of Harrisonville has piped the outflow from its sewage system and sewage disposal plant through the right of way of said defendant Missouri Pacific Railroad Company and is discharging the said sewage matter, which causes the said pollution and contamination in said watercourse, onto the said right of way at a point approximately on the line of plaintiff's said property, from which point the said sewage matter flows directly into said watercourse upon said plaintiff's land. The defendant Missouri Pacific Railroad Company was however bound by statute to permit the use of its right of way for a sewage line and the said defendant Railroad Company is guilty of no wrong in connection with the said wrongful acts of the defendant city. However, jurisdiction should be and is hereby retained over said defendant railroad pending compliance with the order and decree herein made against said defendant city.

Wherefore, it is Ordered, Adjudged and Decreed, that plaintiff have and recover of the defendant city of Harrisonville the sum of four thousand dollars ($4,000.00) with interest thereon at the rate of six per cent (6%) per annum from this date with costs to said plaintiff to be taxed, and that plaintiff have execution therefor. It is further ordered, adjudged and decreed that the defendant City of Harrisonville be and it is hereby enjoined from the discharge of putrescible sewage matter into said watercourse in, on or above said plaintiff's land; provided, however, and it is further ordered, adjudged and decreed that the said defendant be, and it is hereby given a period of six months from the date of this decree in which to abate the said nuisance by such adequate and effective method or methods as the said defendant City may select to prevent, cease and determine the dis-
21 charge of putrescible sewage matter into the said watercourse in, on or above said plaintiff's land. It is further ordered, adjudged and decreed that and the Court hereby reserves jurisdiction of this cause for the rendition of such further orders with respect to enforcement and execution of this judgment and decree as shall be deemed by the Court necessary in the premises. To all of which judgment, order and decree the defendants except.

Dated July 10, 1930.

ALBERT L. REEVES,
District Judge.

Filed in the United States District Court July 10, 1930.

22 Notice of Petition for Appeal

To the Honorable Maurice H. Winger, P. E. Reeder, Frank P. Barker, Alton Gumbiner and Leland Hazard:

You are hereby notified that the defendant in the above entitled action, City of Harrisonville, Missouri, is filing in the above entitled court its petition for appeal from the decree of the Honorable Albert L. Reeves, Judge of said court, entered in the above entitled action on the 10th day of July, 1930, and that the said defendant, City of Harrisonville, Missouri, will on Wednesday, October 8, 1930, at nine o'clock A. M., or as soon thereafter as counsel may be heard, present in said District Court at Kansas City, Missouri, its said petition for appeal to the said Honorable Albert L. Reeves, District Judge, if he be then and there sitting, and if not then to the Honorable Merrill Otis, District Judge of said court, if he be then sitting, and ask that said appeal be allowed and that pending the determination of said appeal the said decree of July 10, 1930 be suspended and that said court make its order relating to the security to be given by said defendant.

RAYMOND G. BARNETT
ALLEN B. GLENN
Attorneys for City of Harrisonville, Missouri, Defendant and Appellant.

Received a copy of the above notice this 6th day of October, 1930.

WINGER, REEDER, BARKER, GUMBINER & HAZARD,
Leland Hazard
Maurice H. Winger
Attorneys for Plaintiff.

Filed in the United States District Court Oct. 7, 1930.

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23 Petition for Appeal

To the Honorable Albert L. Reeves, District Judge:

The above named defendant, City of Harrisonville, Missouri, a municipal corporation, feeling aggrieved by the decree rendered and entered in the above entitled cause on the 10th day of July, A. D. 1930, does hereby appeal from said decree to the Circuit Court of Appeals for the 8th Circuit

of the United States, for the reasons set forth in the assignment of errors filed herewith, and prays that its appeal be allowed and that citation be issued as provided by law, and that a transcript of the record, proceedings and documents upon which said decree was based, duly authenticated, be sent to the United States Circuit Court of Appeals for the 8th Circuit, sitting at St. Louis, Missouri, under the rules of such court in such cases made and provided. And your petitioner further prays that such appeal operate as a supersedeas and that during the pendency of such appeal all proceedings for the enforcement of the said decree be suspended, and further prays that the proper order relating to the required security to be required of it be made.

RAYMOND G. BARNETT
ALLEN B. GLENN
Attorneys for defendant and appellant
City of Harrisonville, Missouri.

Filed in the United States District Court Oct. 7, 1930

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24 Assignment of Errors.

Now comes the defendant, City of Harrisonville, Missouri, in the above entitled cause and files the following assignment of errors upon which it will rely upon its prosecution of the appeal in the above entitled cause from the decree made by this honorable court on the 10th day of July, 1930.

I.

That the United States District Court for the Western Division of the Western District of Missouri erred in overruling the objection of said defendant and appellant to the introduction of any evidence under the petition and the motion interposed by the said defendant and appellant at the beginning of the trial to dismiss said action on the ground that the petition disclosed that plaintiff had no cause of action for equitable relief, but that the action accruing to the property owner, if any, on account of the alleged nuisance was an action at law for original damages on account of a permanent nuisance.

II.

That said court erred in overruling the objection of said defendant to the evidence of the plaintiff of the value of the herd of cattle upon the land in question on the ground that such value constituted no element of a proper measure of damages.

III.

That said court erred in overruling the objection of said defendant to the evidence of the plaintiff of the cost of improvements made upon the land in question and neighboring land on the ground that the cost of such improvements constituted no element of a proper measure of damages.

IV.

That said court erred in overruling the objection of said defendant to the testimony of the plaintiff's witness, W. S. Dickey, concerning the fair rental value of the land if the water were unpolluted, the ground of said objection being that the witness was not a competent witness on said matter, and that contrary to the evidence the question assumed that except for said defendants' disposal plant the waters of the creek in question were pure and undefiled.

V.

The court erred in overruling the objections of said defendant to the evidence of the plaintiff concerning methods of secondary treatment for sewage, the ground of such objection being that the right to determine the type of sewage disposal plant to be erected lay within the province of the legislative representatives of the city and beyond the proince of the court to modify it.

VI.

Said Court erred in overruling the objection of said defendant to the evidence of the plaintiff concerning the reasonable rental value of the land in question, the ground of objection being that said question was made applicable to town cows when the evidence failed to show any market for said pasture for such use and further that the defendant's disposal plant in question if a nuisance at all was, under the pleadings and the plaintiff's own evidence, a permanent nuisance, in which event the measure of damages was not the rental value of the land but its diminution in reasonable market value, if any, caused by such alleged nuisance.

VII.

Said court erred in overruling the objection of said defendant and the motion of said defendant to strike out all of the testimony relative to the value of said land for the pasturage of town cows, the ground of said objection and motion being that the evidence failed to show any market for said land for said purpose and that said evidence was not within any issue raised by the pleadings.

26 VIII.

Said court erred in overruling the objection of said defendant to the evidence of the plaintiff concerning secondary treatment for the effluent from the disposal plant in question, the ground of said objection being that the character of the disposal plant was a matter for determination by the city authorities within their discretion and not a matter for determination by the court, and that if any nuisance had been created by such disposal plant the remedy of the property owner in such case was an action for damages as for a permanent nuisance.

IX.

Said court erred in overruling the objection of said defendant to the evidence of the plaintiff that the Health Department of Missouri had, subsequent to the erection of the disposal plant, recommended some additional treatment for the effluent therefrom, the ground of such objection being that it was immaterial what might be the recommendations of the Health Department, that the question was one merely of what might be required by law.

X.

That said court erred in overruling the objection of said defendant to the evidence of plaintiff concerning the cost of removing objectionable deposits in the stream in question, the ground of said objection being that by the plaintiff's own evidence it appeared that if defendant were guilty of maintaining any nuisance at all, such nuisance was a permanent nuisance, and the measure of damages accruing to the owner of land damaged thereby was the decrease in the value of his land caused by the erection of such permanent nuisance.

XI.

Said court erred in overruling the motion of said defendant made at the close of plaintiff's case to dismiss said action, the ground of said motion being that under the
27 . pleadings and the law and the evidence it appeared that plaintiff had no such cause of action as it sought to assert, that if any injury arose to the plaintiff's land from the operation of the disposal plant in question such injury was inherent in the use of the plant from its very beginning, constituting the same a permanent nuisance, and that the relief of the land owner for such invasion, if any, of his rights was an action at law for damages for the diminution of the value of his land by reason of the operation of said plant, and that said plant served the general public

convenience and must, as against an individual asserting property damage, be held, if held to be a nuisance at all, a permanent nuisance for which equity provided no relief, but for which the land owner was remitted to an action for damages as for a permanent nuisance, and further upon the ground that under the petition and the evidence it appeared that plaintiff sought an order modifying the present disposal plant notwithstanding that such an order was beyond the jurisdiction of the court and notwithstanding that plaintiff's evidence failed to show that said defendant was financially able to construct such a supplementary plant or that under the condition of its finances and the limitations of the Constitution of the State of Missouri it had the financial means or the power to build such a secondary plant.

XII.

Said court erred in sustaining the objection of the plaintiff to the Exhibit H. offered in evidence by said defendant, said exhibit being the report of a pathological laboratory on certain specimens submitted for analysis, the plaintiff's objection being that it was hearsay.

XIII.

Said court erred in entering its finding and decree in
28 favor of the plaintiff herein for the following reasons:

A. It erred in finding that because the effluent from the disposal plant in question polluted the stream in question it constituted a nuisance upon the plaintiff's land, when the issue of fact was whether the effluent polluted the stream more than the pollution therein present before the erection of the plant.

B. It erred in finding without support of evidence and contrary to the evidence that reasonable means were available to the defendant, City, to abate the alleged nuisance.

C. It erred in finding contrary to the evidence that the plaintiff has been damaged by the loss of rents and profits on said land during said period in the sum of $500.00.

D. It erred in finding that the cost of removing the objectionable deposits from said creek, said to be $3500.00, is an element of damage to the plaintiff.

E. It erred in finding that the alleged loss of rents and profits and the alleged cost of removing the alleged pollution from said creek is a proper measure of the damages alleged to have been occasioned to said land by the maintenance of said disposal plant.

F. It erred in enjoining the defendant, City, from the further use after the expiration of six months of the said disposal plant, a structure which is to said city a sanitary necessity.

G. It erred in requiring in effect that the defendant, City, erect an additional and supplementary disposal plant and in thus invading the legislative powers and discretion of the defendant, City.

H. It erred in awarding equitable relief upon pleadings and evidence showing that the structure in question,
29 if a nuisance at all, was a permanent nuisance, for any resulting damage from the operation of which the only proper action was an action at law by the owner of the property affected for original damages resulting from a permanent nuisance.

I. It erred in ignoring the financial and constitutional limitations upon the city preventing its compliance with the requirements in the decree for the erection of a supplementary plant.

J. It erred in ignoring the preponderating public convenience and necessity served by the structure in question when the complaint against the same was based upon mere property damage.

K. It erred in adjudging against the defendant, City, and in favor of the plaintiff a judgment for the lump sum of $4,000, and by the requirements of said decree for a supplementary disposal plant fastening upon the city an additional expenditure of $25,000 to $40,000, when by the terms of the decree itself it appears that plaintiff had been suffering damages because of the said structure not to exceed $100.00 a year.

L. It erred in fastening upon the defendant, City, by its decree the lump sum judgment of $4,000 plus the additional expenditure for a supplementary plant increasing the amount to $40,000 when by the undisputed evidence the total value of the land affected does not exceed $6,000, and the total damages done thereto by the perpetual maintenance of the disposal plant as it now is does not exceed $2,000.

Wherefore, this appellant prays that said decree be reversed and that said District Court for the Western Division of the Western District of Missouri be ordered to enter

a decree reversing the decision of the lower court in said cause.

30 RAYMOND G. BARNETT,
ALLEN B. GLENN,
Attorneys for appellant.

Filed in the United States District Court Oct. 7, 1930.

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31 Order Allowing Appeal.

On the motion of Raymond G. Barnett and Allen B. Glenn, solicitors and counsel for defendant, City of Harrisonville, Missouri, it is hereby ordered that an appeal to the United States Circuit Court of Appeals for the 8th Circuit from the decree heretofore filed and entered herein, be, and the same is hereby allowed, and that a certified transcript of the record, testimony, exhibits, stipulations and all proceedings be forthwith transmitted to said United States Circuit Court of Appeals for the 8th Circuit. It is further ordered that the bond on appeal be fixed at the sum of $1,000.00, the same to serve as a bond for cost and damages on appeal.

Dated October 8, 1930.

MERRILL E. OTIS, Judge.
In the absence of Judge Reeves from the Western Division and at his request.

Filed in the United States District Court Oct. 8, 1930.

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32 Order, Nov. 6, 1930, Extending Time to File Transcript.

Now for good cause shown the time for docketing the appeal herein and filing the record of this cause in the Circuit Court of Appeals of the United States, Eighth Circuit, is enlarged to permit the appellant herein to docket said case and file such record with the clerk of said Circuit Court of Appeals of the United States, Eighth Circuit, on or before the 31st day of December, 1930.

MERRILL E. OTIS,
United States District Judge for the Western District of Missouri.

Filed in the United States District Court Nov. 6, 1930.

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33 **Bond On Appeal.**

Know All Men By These Presents that we, City of Harrisonville, Missouri, as principal and Fidelity and Deposit Company of Maryland and as sureties of the County of Cass, State of Missouri are held and firmly bound unto W. S. Dickey Clay Manufacturing Company in the sum of $1,000.00 lawful money of the United States to be paid to it and its successors and assigns; to which payment well and truly to be made we bind ourselves and each of us, jointly and severally, and each of our heirs, executors and administrators by these presents.

Sealed with our seals and dated this 16th day of October, 1930.

Whereas the above named City of Harrisonville, Missouri has prosecuted an appeal to the Circuit Court of Appeals of the United States, Eighth Circuit, to reverse the judgment and decree of the District Court for the Western District of Missouri in the above entitled cause.

Now Therefore, the condition of this obligation is such that if the above named City of Harrisonville, Missouri, shall prosecute its said appeal to effect and answer all costs and damages if it fail to make good its plea then this obligation shall be void; otherwise to remain in full force and effect.

(Seal) CITY OF HARRISONVILLE, MISSOURI,
By Lee Spicer, Mayor,
Principal and appellant.

FIDELITY AND DEPOSIT COMPANY OF MARYLAND,
By G. H. Burnett, Attorney in Fact,
Sureties.

34 The within bond is approved both as to sufficiency and form this ..... day of October, 1930.

.....
Judge of the District Court of the United States for the Western District of Missouri.

Filed in the United States District Court Nov. 10, 1930.

35 Notice of Submission of Appeal Bond for Approval.

To the Plaintiff (Appellee) or its Attorneys of Record: Maurice Winger and Leland Hazard:

You are hereby notified that on the 22nd day of November, 1930, at 9:30 o'clock A. M. or as soon thereafter as counsel may be heard, Defendant (Appellant) City of Harrisonville, Missouri, will submit to the Honorable Albert L. Reeves, Judge of the above court, or in his absence to the Honorable Merrill E. Otis, Judge of the above court, its appeal bond herein for the approval of the court.

RAYMOND G. BARNETT,
ALLEN B. GLENN,
Attorneys for City of Harrisonville, Missouri, Defendant and Appellant.

Received copy of the above notice this .... day of November, 1930.

. . . . . .
Attorney for Plaintiff (Appellee) W. S. Dickey Clay Manufacturing Company.

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36 State of Missouri,
County of Jackson—ss.

John R. James of lawful age being duly sworn upon his oath states that he delivered a copy of the within notice of submission of appeal bond for approval to Leland Hazard, one of the attorneys for the plaintiff in the above entitled cause, at his office in Kansas City, Missouri on Monday, November 10th, 1930.

JOHN R. JAMES.

Subscribed and sworn to before me this 14th day of November, 1930.

(Seal) ERMA REID,
Notary Public.

My commission expires Sept. 23, 1934.

Filed in the United States District Court Nov. 14, 1930.

37 Notice of Lodgment of Statement of Proceedings and Evidence.

To W. S. Dickey Clay Manufacturing Company, Plaintiff above and appellee on appeal and to its Attorneys of Record, Maurice Winger and Leland Hazard:

You are hereby notified that on November 10th, 1930, Defendant in the trial court and appellant in the appeal in the above entitled cause lodged in the office of the Clerk of the above entitled court its statement of the proceedings had and of the evidence offered upon the trial of said case and that on the 22nd day of November, 1930, at 9:30 o'clock A. M. or as soon thereafter as counsel may be heard, said Defendant, City of Harrisonville, will present such statement to the court and ask the court to approve the same as a just and true statement of the proceedings had and of the evidence offered upon the trial of the case.

RAYMOND G. BARNETT,
ALLEN B. GLENN,
Attorneys for City of Harrisonville, Missouri, Defendant in the above entitled cause and appellant in the appeal therein.

Received a copy of the above notice this 12 day of November, 1930.

WINGER, REEDER, BARKER, GUMBINER & HAZARD,
Attorneys for W. S. Dickey Clay Manufacturing Company, Plaintiff in the above entitled cause and appellee in the appeal therein.

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38 State of Missouri,
County of Jackson—ss.

John R. James of lawful age being duly sworn upon his oath states that he delivered a copy of the within notice of lodgment of statement of proceedings and evidence to Leland Hazard, one of the attorneys for the plaintiff in the above entitled cause, at his office in Kansas City, Missouri, on Monday, November 10th, 1930.

(Seal) JOHN R. JAMES.

Subscribed and sworn to before me this 14th day of November, 1930.

ERMA REID,
Notary Public.

My commission expires Sept. 23, 1934.

Filed in the United States District Court Nov. 14, 1930.

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39 Praecipe for Transcript.

To The Clerk of the Above Entitled Court:

You will please prepare for the purpose of appeal in the above entitled cause a transcript of the record therein and for such purposes you will please include the following documents together with the filing marks thereon.

1. The petition herein.

2. The answer of Defendant, City of Harrisonville, Missouri.

3. The answer of Defendant, Missouri Pacific Railroad Company.

4. The decree of the Court in said cause entered July 10, 1930.

5. The Court's opinion in the case.

6. The petition of Defendant, City of Harrisonville, Missouri for appeal.

7. The assignments of error filed by Defendant, City of Harrisonville, Missouri.

8. The notice of petition for appeal, together with the acknowledgment of service thereon.

9. The order allowing appeal.

10. The citation to plaintiff, W. S. Dickey Clay Manufacturing Company, together with the acknowledgment of service thereof appearing thereon.

11. The appeal bond, together with the approval of the court thereon.

12. The notice of submission of the appeal bond, together with the acknowledgment of service thereon.

13. The statement of the proceedings had and of the evidence offered upon the trial of the case.

14. Notice of lodgment of the statement of the proceedings and of the evidence offered upon the trial of the
40 case and of the intention to ask the court's approval thereof, together with the acknowledgment of service of such notice.

15. Court's approval of the statement of the proceedings had and of the evidence offered upon the trial of the case.

16. This praecipe together with the acknowledgment thereon of a service of a copy hereof.

17. Order enlarging the time for filing record on appeal.

RAYMOND G. BARNETT,
ALLEN B. GLENN,
Attorneys for Defendant above and Appellant on appeal, City of Harrisonville, Missouri.

Received a copy of the above praecipe this 12 day of November, 1930.

WINGER, REEDER, BARKER, GUMBINER & HAZARD,
Attorneys for Plaintiff above, appellee on this appeal, W. S. Dickey Clay Manufacturing Company.

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41 State of Missouri,
County of Jackson—ss.

John R. James of lawful age being duly sworn upon his oath states that he delivered a copy of the within praecipe for transcript to Leland Hazard, one of the attorneys for the plaintiff in the above entitled cause, at his office in Kansas City, Missouri, on Monday, November 10th, 1930.

JOHN R. JAMES.

Subscribed and sworn to before me this 14th day of November, 1930.

(Seal) ERMA REID,
Notary Public.

My commission expires Sept. 23rd, 1934.

Filed in the United States District Court Nov. 14, 1930.

42 (Stipulation as to Approval of Appeal Bond and Statement of Evidence)

It is hereby stipulated by the parties in this cause that the matter of approval of Appeal Bond and approval of Appellant's statement of proceedings had and evidence offered upon the trial, both of which matters were set for hearing in said Court on November 22nd, or as soon thereafter as Counsel may be heard, were by agreement continued for hearing until December 10th, 1930, at which time said matters will be presented to the Court.

It is further stipulated that Counsel for Plaintiff (Appellee) may have additional time in which to indicate additional portions of the Record to be incorporated in the transcript on Appeal; and appellant waives any and all objections to the allowance of such additional time by order of the Court or otherwise, and agrees that Plaintiff (Appellee) may have until December 10th for such purpose.

ALLEN B. GLENN,
RAYMOND G. BARNETT,
Attorneys for City of Harrisonville,
Defendant and Appellant.

WINGER, REEDER, BARKER,
GUMBINER & HAZARD,
Attorneys for Plaintiff and Appellee.

Filed in United States District Court Nov. 29, 1930.

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43 (Order, Nov. 29, 1930, Extending Time for Plaintiff to Indicate Portions of Record to be Included in Transcript).

This Cause coming on to be heard on November 29th, upon the application of Plaintiff (Appellee) for additional time in which to indicate additional portions of the Record to be incorporated into the transcript on appeal, it is ordered, adjudged and decreed that Plaintiff (Appellee) have until December 10th in which to indicate additional portions of the Record to be incorporated into a transcript on appeal.

ALBERT L. REEVES, Judge.

Filed in the United States District Court Nov. 29, 1930.

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44 (Stipulation as to Further Continuance of Hearing of Approval of Bond on Appeal, etc.)

It is hereby stipulated by the parties to this cause that the matter of approval of appeal bond and approval of appellants' statement of proceedings had and evidence offered upon the trial, both of which matters were set for hearing in said court by agreement of counsel on December 10th, 1930, shall be continued for hearing until December 23rd. It is further stipulated that counsel for plaintiff (Appellee) will have additional time in which to indicate additional portions of the record to be incorporated in the transcript on appeal; and appellant waives any and all objections to the allowance of such additional time by order of the court or otherwise, and agrees that plaintiff (appellee) may have until December 23rd for such purposes; (both judges of the said court being absent from the city upon this date, a court order for the matters herein stipulated is waived by both parties).

Dated this December 10th, 1930.

CLEARY & BARNETT,
Attorneys for City of Harrisonville,
Defendant and Appellant.

WINGER, REEDER, BARKER,
GUMBINER & HAZARD,
Attorneys for plaintiff and appellee.

Filed in the United States District Court Dec. 19, 1930.

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45 . (Order, Dec. 29, 1930, Further Extending Time to File Transcript.)

Now for good cause shown the time for docketing the appeal herein and filing the record of this cause in the Circuit Court of Appeals of the United States, Eighth Circuit, is enlarged to permit the appellant herein to docket said case and file such record with the clerk of said Circuit Court of Appeals of the United States, Eighth Circuit, on or before the 1st day of February, 1931.

ALBERT L. REEVES,
United States District Judge for
the Western District of Missouri.

The above order consented to.

WINGER, REEDER, BARKER,
GUMBINER & HAZARD,
Attorneys for Plaintiff.

Filed in the United States District Court Dec. 29, 1930

46 (Order, Jan. 28, 1931, Further Extending Time to File Transcript.)

Now for good cause shown the time for docketing the appeal herein and filing the record of this cause in the Circuit Court of Appeals of the United States, Eighth Circuit, is enlarged to permit the appellant herein to docket said case and file such record with the Clerk of said Circuit Court of Appeals of the United States, Eighth Circuit, on or before the 1st day of March, 1931.

ALBERT L. REEVES,
United States District Judge for
the Western District of Missouri.

The above order consented to.

WINGER, REEDER, BARKER,
GUMBINER & HAZARD,
Attorneys for Plaintiff.

Filed in the United States District Court, Jan. 28, 1930.

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47 (Order, Feb. 25, 1931, Further Extending Time to File Transcript.)

Now for good cause shown the time for docketing the appeal herein and filing the record of this cause in the Circuit Court of Appeals of the United States, Eighth Circuit, is enlarged to permit the appellant herein to docket said case and file such record with the clerk of said Circuit Court of Appeals of the United States, Eighth Circuit, on or before the 1st day of April, 1931.

ALBERT L. REEVES,
United States District Judge for
the Western District of Missouri.

The above order consented to.

WINGER, REEDER, BARKER,
GUMBINER & HAZARD,
Attorneys for Plaintiff.

Filed in the United States District Court Feb. 25, 1931.

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48 (Order, Mch. 28, 1931, Further Extending Time to File Transcript.)

Now for good cause shown the time for docketing the appeal herein and filing the record of this cause in the Circuit Court of Appeals of the United States, Eighth Circuit, is enlarged to permit the appellant herein to docket said case and file such record with the clerk of said Circuit Court of Appeals of the United States, Eighth Circuit, on or before the 1st day of May, 1931.

ALBERT L. REEVES,
United States District Judge for the
Western District of Missouri.

The above order consented to.

WINGER, REEDER, BARKER,
GUMBINER & HAZARD,
Attorneys for Plaintiff.

Filed in the United States District Court Mch. 28, 1931.

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49 (Order, Apr. 24, 1931, Further Extending Time to File Transcript.)

Now for good cause shown the time for docketing the appeal herein and filing the record of this cause in the Circuit Court of Appeals of the United States, Eighth Circuit, is enlarged to permit the appellant herein to docket said case and file such record with the clerk of said Circuit Court of Appeals of the United States, Eighth Circuit, on or before the 1st day of June, 1931.

MERRILL E. OTIS,
United States District Judge for the
Western District of Missouri.

In the absence of Judge Reeves
from Kansas City.

The above order consented to.

WINGER, REEDER, BARKER,
GUMBINER & HAZARD,
Attorneys for Plaintiff.

Filed in the United States District Court Apr. 24, 1931.

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50 (Order, May 27, 1931, Further Extending Time to File Transcript.)

Now for good cause shown the time for docketing the appeal herein and filing the record of this cause in the Circuit Court of Appeals of the United States, Eighth Circuit, is enlarged to permit the appellant herein to docket said case and file such record with the clerk of said Circuit Court of Appeals of the United States, Eighth Circuit, on or before the 1st day of July, 1931.

ALBERT L. REEVES,
United States District Judge for the
Western District of Missouri.

The above order consented to.

WINGER, REEDER, BARKER,
GUMBINER & HAZARD,
Attorneys for Plaintiff.

Filed in the United States District Court May 27, 1931.

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51 (Stipulation as to Filing of Supplemental Praecipe, Etc.)

Whereas defendant, City of Harrisonville, Missouri, appellant from the decree of the court herein did heretofore lodge with the clerk of this court its statement of the proceedings had and of the evidence offered upon the trial of the case; and,

Whereas at the request of the plaintiff herein and appellee on appeal the parties have since that time collaborated in the preparation of a new statement of the proceedings had and of the evidence offered upon the trial of the case which they are offering jointly to the court as a substitute for that heretofore lodged with the court on November 10, 1930; and,

Whereas said appellant did heretofore on November 10, 1930 file herein its praecipe, having duly served a copy thereof upon appellee; and,

Whereas various stipulations have been filed and orders entered since the filing of said praecipe; and,

Whereas said appellant did heretofore on the 10th day of November, 1930, file herein its appeal bond in the sum of

$1,000.00 and serve notice thereof upon the appellee and of the time when it would apply to the court for the approval of said bond; and,

Whereas at appellee's request said matter has not heretofore been presented to the court; and,

Whereas the parties have now agreed between them that said appellant may file and shall file its appeal bond herein in the penal sum of $5,000.00 with the American Surety Company of New York as surety thereon;

Now Therefore, it is agreed between the parties here-
52 to that said appellant shall have leave to file a supplemental praecipe herein, a copy of which is hereto attached, and shall have leave to file said new appeal bond in the penal sum of $5,000.00 and take the court's approval thereon, appellee waiving any and all objections to the filing of such bond at this time and agreeing that in consideration of the filing thereof it will withhold any request for the enforcement of the decree herein entered by the District Court until the final determination of this case upon appeal.

WINGER REEDER BARKER
GUMBINER & HAZARD
Attorneys for plaintiff and appellee on appeal, W. S. Dickey Clay Manufacturing Company.

RAYMOND G. BARNETT
ALLEN B. GLENN
Attorneys for defendant and appellant on appeal, City of Harrisonville, Missouri.

Filed in the United States District Court June 15, 1931

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53 (Statement of Evidence.)

In the District Court of the United States for the Western Division of the Western District of Missouri.

W. S. Dickey Clay Manufacturing Company, Plaintiff,
In Equity vs. No. 1201.
City of Harrisonville, Missouri, a municipal corporation, and Missouri Pacific Railroad Company, Defendants.

This case came on regularly for trial before the Honorable Albert L. Reeves, one of the District Judges of the above court, on Tuesday, June 17, 1930, plaintiff being represented

by its counsel, Maurice Winger and Leland Hazard and defendant, City of Harrisonville, being represented by its counsel, Raymond G. Barnett, John R. James and Judge Allen Glenn, and defendant, Missouri Pacific Railroad Company being represented by its counsel, Glenn R. Donaldson. Statements were made to the court by counsel on behalf of each of the parties concerning the character of the case and the expectation of the parties of what the evidence would be. In the course of the statement made on behalf of the defendant, City of Harrisonville, attention was called to the fact that the sewer system and disposal plant in question, complained of by plaintiff, served the public convenience and the contention was made on behalf of said city of Harrisonville that the matter of public convenience would outweigh any question of private property damage to the extent that the continued use of said sewer system and disposal plant was not properly subject to injunction but that if any damage had been done the land in question owned by plaintiff the remedy therefor was not an action in equity to abate the use of said sewage system and disposal plant, but an action for damages as for a permanent nuisance. At the conclusion of the opening statements and prior to the introduction of
54 any evidence the defendant, City of Harrisonville, made the following objection and motion which was adopted by the defendant, Missouri Pacific Railroad Company, "Mr. Barnett (counsel for City of Harrisonville): For the benefit of the record, if the court please, let me, prior to the examination of Mr. Dickey, who I understand will be the plaintiff's first witness, object to the introduction of any evidence under the petition in this case and move the dismissal of the case for the reason that the petition discloses that the case is not a proper one in equity but one for damages, assuming that the plaintiff has suffered any injuries of any character." This objection was by the court overruled and this motion to dismiss denied, to which the defendants then and there duly excepted and still except.

Plaintiff's Case

Thereupon the plaintiff offered evidence as follows:

WALTER S. DICKEY, witness:

Mr. Dickey testified that he is the president of the plaintiff and that the plaintiff is the owner of a farm located near Harrisonville, Missouri, described in the petition; that the

entire farm is something over 300 acres and divided by the right-of-way of the Missouri Pacific Railroad into about equal parts; that plaintiff's exhibit 1 is a correct plat of the farm and the location of the railroad right-of-way, the farm property being shown within the enclosure of the red line on said plat and lying just a few hundred feet outside the city limits of Harrisonville; that the sewage disposal plant, known as the Imhoff tank, maintained by the City of Harrisonville, of which plaintiff complained, is located at the point marked "A" on said plat, a little square adjoining the east side of the railroad right-of-way of the Missouri Pacific.

That immediately west of this disposal plant lies the Missouri Pacific Railroad right-of-way and immediately west of that 100 foot right-of-way lies a part of plaintiff's land marked on the plat, "Kunze 18 "A" and F. Deacon 14.17 A, and through a part of which is shown a meandering line
55 representing Town Creek; that the outflow from the disposal plant called "Imhoff Tank" flows west by a conduit under the hundred foot right-of-way of the Missouri Pacific Railroad Company to a point two or three feet inside the property line of the plaintiff where it discharges into Town Creek at a point marked "B" within the red lines; that this Town Creek is a small affair, except when fed by some springs and rainfall; that it enters plaintiff's property slightly north of this point of discharge, the point of discharge being marked "B" on the plat and the point of entering of the creek into plaintiff's property being marked "B 1"; that the creek from the point "B 1" flows in a southerly direction until at the point marked "C" on the plat it joins with another stream called "Muddy Creek", continuing its flow therefrom in a westerly direction under the name "Muddy Creek".

Mr. Dickey testified that the land lying west of the railroad track is approximately 150 acres, a bottom blue grass wooded pasture with a stream meandering through it, the land being partially rolling; that the land is used as pasture land, about 90 to 100 head of live stock being pastured there at the present time; that he has examined the creek recently and at many times during the last three or four years and is thoroughly familiar with it; that on plaintiff's land it flows between the Missouri Pacific Railroad's right-of-way and the bluff a few hundred feet west of it; that the Missouri Pacific Railroad's right-of-way runs down through the valley and that the land along the creek is rich, alluvial, black soil and that at times there is a good deal of water that comes down from the creek

when there are freshets or heavy rains; that as a rule it is quite a small stream divided up into pools of water, not a continuous rapidly flowing stream, but ample to supply cattle for watering purposes; that up to the point where
56 the effluent from the disposal plant flows into the stream it is comparatively clear, that one can see the bottom of it and that the banks are free of any nuisance or discoloration and that below the point of discharge from the tank into the stream its appearance changes;

"Q. Now, describe the appearance of the creek below the sewer outlet.

A. Well, this small so-called Town Creek below where the sewage enters it from the City of Harrisonville is in a frightful condition now, and has been getting worse and worse for several years. The banks of that creek range from six to eight or ten feet high with shade trees along it in many cases; in many cases roots are sticking out into the bank and as the water that flows down that stream rises and falls with a heavy rain or with a stormy season or the season of the year when the ground is full of water, the sewage coming out of that tank is deposited on the sides of the bank on both sides, and is plainly noticeable to the naked eye, and it is noticeable otherwise because of the terrific odors from it.

Q. What is the color of the water in the creek?

A. Well, in contra-distinction to the color above the intake from the tank, the upper part of it being quite clear and free of any serious obnoxious character, from where the tank flows into it, it is the very opposite, highly discolored, dark, sometimes greenish dark, and in the pools where water gathers and isn't flushed out by rainstorms or in dry seasons, it is particularly black and offensive. It gives off very strong odors, and there is evidence on both sides of the creek of its pollution with human filth.

Q. Now, you say you have made frequent examinations. What is the condition in that creek after a heavy rain?

A. Well, this little valley that the creek flows through and the creek bed is naturally washed and cleansed when we have a heavy rain storm such as we had last Saturday night for eight or ten hours, and after such a storm or after a week's rain in the spring, the creek is more or less cleaned out and washed out, and it looks different and it looks better, and there is not such a terrific odor from it, but those are only on occasions. A great part of the time it is very, very offensive."

57 After a heavy storm the creek is more or less cleaned out and washed out and looks different and there is not so much odor from it, but that a great part of the time it is very offensive; that even a heavy rain will not wash out the banks of the creek entirely; that this condition exists for a couple of miles down the stream, which is a rough estimate of the distance it runs by all of its meanderings upon the plaintiff's land.

Mr. Dicked further testified that there is another creek described as Muddy Creek, which flows through a part of plaintiff's land on the east side of the Missouri Pacific right-of-way, and flows under that right-of-way into the plaintiff's land on the west side of the right-of-way and flows to a point where it joins Town Creek and then flows on west therefrom; that Muddy Creek is the main stream and that Town Creek, which receives the sewage discharge, is a much smaller affair; that Muddy Creek is a clear, reasonably fresh stream with some constant flow; that Muddy Creek below the point marked "C" where it receives the waters of Town Creek is if anything worse than Town Creek, because the stream is larger, the banks higher, and with the rise and fall of water in storm times the sewage settles on the sides of the bank; that the plaintiff's land east of the railroad right-of-way is of the same character; that it is Harrisonville's old time fair grounds and all grazing land in blue glass; that all of the land west of the Missouri Pacific Railroad and all of the bottom land around there skirting the bluff is pasture land all down the creek; that it is a pasture farm suitable for the purposes for which it has been used.

He further testified that the condition of pollution in the creek has existed about six years, getting worse all the time; that when the condition was first noticed the cattle didn't want to drink the water, "we appealed" to the city officials, mayor, clerk, engineer, and made numerous visits down there with them, visited them a half a dozen times and telephoned them; we didn't seem to be getting anywhere by that method so we undertook to have a conference with some of the business men, but the city did nothing with reference to correcting the condition.

58 He further testified that he is the owner of the herd of cattle on the farm and that as an individual he rents the farm from the plaintiff.

"Q. What is the approximate value of the herd of cattle on the farm?

"Mr. Barnett (representing defendant, City of Harrisonville): Just a minute, if the court please. I object to that as not a proper measure of damages in this case. If there is any damage at all it is to be ascertained, as I understand it, under one of two measures. If the damage is to be ascertained as damage for a temporary nuisance, then of course it is the decrease in the reasonable rental value of the property, so much of the property as is affected by this stream, not necessarily the whole tract. On the other hand, if the damage is to be ascertained as for a permanent nuisance, then of course it is the decrease in the market value of the land, that is, again, through such of the land as is affected by this creek, and the value of the cattle on the land is not a measure of the plaintiff's damages in any respect, assuming that the plaintiff has suffered some damage.

"The Court: Of course we have an inference to assume, what the values will be, of course the value of the cattle would not influence the situation save only to determine whether or not it has an effect upon the rental value of the property. If you can determine that and know what cattle were kept there—the objection will be overruled".

(To this ruling and action of the court the defendant, City of Harrisonville, at the time duly excepted and still excepts.)

He testified that a fair estimate would be that the registered Hereford cattle on the land at that time were worth about $20,000.; that they were all registered cattle with the exception of five Holstein nurse cows; that this is a beautiful tract of very rich, blue glass land on the outskirts of the county seat of the City of Harrisonville, and prior to the pollution was amply watered which was its chief attraction of the farm; that the state highway skirts several hundred feet of it; that it is of easy access by rail, three railroads and the highway; that the land affected is the land west of, but not the land east of, the railroad right-of-way, except at times for the odors that sweep over there; that the land on the east is equipped with suitable barns, a silo and
59 water supply to the barns and elsewhere and is rigged up for the purpose of raising registered live stock or selling for breeding purposes; that the pipes of water supply used in the barn are all on the east side of the tract; that also on the east side there has been built a large, glazed, hollow tile barn, fitted with metal furnishings and partitions, feed boxes and feed room, silo which we fill every year, and equipped with water mains and pipes for water and that the entire place is fenced and cross fenced.

"Q. At what expense have these improvements been made?

"Mr. Barnett (Representing defendant City of Harrisonville): I object again. I do not think this is any proper measure of damages. I object to the whole line of this testimony. I do not want to unduly interrupt the witness and counsel, but I want to save the point and be understood by the court as objecting to this whole line of testimony about the various improvements and things of that kind on
60 the property, and insist again that the measure of damages is such as I stated in my last objection (the one last herein set forth).

The Court: "The objection will be overruled at this time".

(To this ruling and action of the court, the defendant, City of Harrisonville, duly excepted and still excepts).

Mr. Dickey continuing testified that the cost of the improvements on the farm run $25,000 or $30,000 in the barns, silo and the water supply of the ponds that have been created for water and the pumps in connection with them, fencing, things of that kind; that the land affected by the polluted stream is about 110 or 120 acres, because the stream runs through about that much, and that when the balance of the land is damaged from the recurring odors, especially in summer when the streams are low; that this odor is pronounced and can be smelled for half a mile at times when the wind is in the right direction.

Mr. Dickey testified he had been buying and selling real estate to some extent in and around Jackson County for a number of years and that he owned farms other than the farm in question; that he had cultivated these farms and raised Hereford cattle and nurse cows for them, no other kind of cattle; that he would not think he would be any expert on the rental value at Harrisonville, but that he had an idea about it; that he was not engaged in that business down in that particular county but that he thought he knew something about it; that he paid rent at the present time to the plaintiff for the land in question of about $3.17 per acre per annum; that is for the 120 acres affected by the creek.

Q. "If the water supply in that 120 acres were unpolluted what would be a fair rental value per acre for that 120 acres?"

"Mr. Barnett (representing defendant, City of Harrisonville): I object to that question for the reason, first, that the

witness is not shown to be competent to give expert testimony on that subject in this location; the witness' experience in the County of Jackson, even if that tended to qualify him as an expert in the County of Jackson wouldn't obtain with reference to the lands and rental values in Cass County, for the reason, which is well known and of which doubtless the court takes judicial notice, that Jackson County is
61 crossed and recrossed with a system of many rock highways and has a much greater density of population, and that the witness is not shown to be qualified to give expert testimony on the subject of rental values in Cass County, Missouri, which is purely a rural community."

Mr. Dickey testified further that he acquired this farm at Harrisonville about 17 years ago and had been in direct control and ownership of the farm since that time; that Cass County adjoins Jackson County; that he had made frequent trips to his farms including that at Harrisonville; that he is reasonably familiar with Cass County and has been for forty-five years; that he has given attention and study to the use of the farm in question to make it pay its board; that he thinks he is acquainted with the fair rental value of that 120 acres; that he spent about 15 or 16 years acquiring the farm in question, had a man living down there for a year and a half trying to get it; that in that connection he investigated Cass County land in that vicinity and knew generally about it; that he occupied the land in question prior to the construction of the sewer plant of the city; that the condition of the stream prior to the erection of the plant was all right for the purpose of pasturing cattle in the land; that the cattle drank this water at that time and that there were no odors or discolorations or deposits on the banks of the stream.

Q. Then state what the rental value of the 120 acres lying west of the railroad right-of-way would be if this stream had its natural flow and if the sewage plant of the City of Harrisonville did not discharge into this stream.

"Mr. Barnett (representing defendant, City of Harrisonville) I object to that question for the reasons heretofore stated and for the further reason that it assumes pure and undefiled water and a state of facts in conflict with the admissions already made under the evidence and pleadings of the plaintiff to the effect that this stream is in a low place adjacent to this community and naturally would receive the drainage and waste from the community, and would, under no circumstances, regardless of the construction of this

plant, be a pure and unpolluted stream; that the ques-
62 tion is asking of the witness a great many assumptions from him as an expert, not only as an expert in real estate values but asking conclusions from him with reference to the effect of the discharge of this sewer system and the effect of the drainage of the district into the creek without a sewer system; that it is a complete invasion of the province of the court to pass upon those matters of fact.

"The court: The objection will be overruled."

(To the ruling and action of the court the City of Harrisonville duly excepted and still excepts.)

Mr. Dickey continuing testified the land would be worth two and one-half or three times as much per acre with water such as we had before this Imhoff tank was installed; $7.00 or $7.50 per acre per annum for that purpose; that plaintiff has been receiving $3.17 an acre for the land for just five years now within a few days; that plaintiff was incorporated in July, 1925, in the State of Delaware.

Cross-Examination

Mr. Dickey further testified that he commenced to buy this land in 1913 and that the entire tract was assembled by him in 1914, ninety per cent of it bought prior to early 1914; that it was bought in the name of another individual but belonged to him personally; the land standing in the name of Griffin, his purchasing agent, up until later when it was deeded to Mr. Dickey personally and he deeded it to the plaintiff, organized in 1925; that he is the president of the plaintiff and its chief stockholder and owns a majority of the stock of the plaintiff; that the disposal plant was first put in operation in the spring of 1923; that some time after the work was completed and the sewage of the city was turned into the main pipes going down to the Imhoff tank he first noticed the conditions now complained of; that some months after the plant was put in operation he complained to the officials by letter and can produce the written answers; that the conditions complained of were discovered some time late in 1923; that this property was deeded to the
plaintiff as a part of its original capitalization along
63 with other property in 1925; that at that time he was, and for a long time had been, a resident of the State of Missouri.

He testified that the City of Harrisonville stands on a rather high point of ground with reference to the surrounding country and that the land slopes away practically in all

directions from the town square, which is roughly speaking in the center of population of the town; that all of his land in question has access to Muddy Creek before it joins with Town Creek at the point marked "C" on the plat; that the land on the east side of the track where the improvements are has easy access to the land on the west side of the track by a passageway and locked gates and a first class opening across the Missouri Pacific right-of-way, which is used freely; that nearly 100 head of cattle are running on the west side of the track most of the time because that is the best grazing land; that this 100 head of cattle and 7 or 8 horses represents the entire stock on the farm and that it has never been used for any other purpose; that they graze the cattle over on the west side but can't water them and the cattle don't water themselves in the creek; that for the benefit of the cattle on the west side plaintiff has created a small water supply for them from a little spring; that the cattle also go to Muddy Creek for their water; that they won't drink the water out of Town Creek because of the sewage; that they eat the grass, however, all over the tract.

The right hand edge of this plat "Exhibit 1" represents the north and the creek in question may extend further north and east than the beginning of it shown on this plat. The land of Judge Bruce joining on the west is cultivated land. I can't give you the rental value of any Cass County land. Prior to the erection of the disposal plant we had no trouble with the water. It was fine. During that time I never heard of any objection to the water.

Witness, Leslie A. Bruce

Leslie A. Bruce (Judge of the Circuit Court of Cass County and Johnson County, Missouri), called as a witness on behalf of the plaintiff testified upon direct examination as follows:

64 I reside at Pleasant Hill, Missouri, but own a farm on the outskirts of Harrisonville, about 197 acres that I acquired in April, 1923, and designated on plat "Exhibit 1" as A. R. Elder tract and also as lot No. 3, the entire tract bordering the Dickey land for about three-quarters of a mile. Town Creek flows through a part of my land entering it at a point marked "1" in lot 2, leaving it at a point marked "2" and re-entering it again at a point marked "3". Since the fall of 1923 the water in that creek has an odor to it, sometimes more noticeable than others. It is always discolored, a dark color between green and black. There are

deposits on the banks of the stream. The sewage was turned into this stream in the fall of 1923 just a few months after I acquired this land. The conditions referred to have existed constantly since the fall of 1923. Cattle on my farm, about an 80 acre pasture there, have access to this stream and have to cross over it to reach the southern portion of the pasture on my farm. It is my opinion, based upon several years' observation, that it affects the hair on the cattle where this water comes in contact with their legs. For a while I occupied the farm, that is owned the cattle and ran them there myself. The water, I think, injured the appearance of my cattle, giving the hair a dead color, not slick, don't carry any sign of oil that cattle usually carry when doing well and I attribute it to wading across the stream. I now rent the farm. The cattle drink the water at times. My tenants tell me that they are drinking the water. The tenants have a well that they use for their milk cows but some of the stock cattle drink that water. There is only one time I can say that the cattle would not drink it. That was in the winter of 1925. The creek froze over solid. The water came down on top of the ice as far as my land. The tenants undertook to cut the ice for the cattle to drink the water, and they would not drink it. The water flowing down on top of the ice at that time had a noticeable yellow color.

At the present time I receive $4.00 cash rent an acre for my entire tract. I have received as much as $5.00 an acre. I am familiar with plaintiff's land lying west of the railroad right-of-way. It is different in character from my land most of it. It is what we term first bottom land among farmers. That is it adjoins the creek and is a richer soil than
65 mine. It produces more grass, good pasture land. It is partily wooded and the underbrush cleared out, a timber pasture possibly some brush. I never knew of the land to be used for anything but pasture purposes. All my life I have lived between Harrisonville and Pleasant Hill, a distance of five or six miles of Harrisonville and own two farms in the county. I think I am acquainted with rental values of land in the county and the vicinity of Harrisonville. I have observed Town Creek above the sewer outlet. I cross it going to the farm. At the present time it is in good condition. A few years ago, prior to the erection of this sewer system there was some sewage emptied into this stream north of the present disposal plant, the court house had a private sewer and I think maybe it connected with the city jail. The two had a private sewer that emptied into the stream about three-quarters of a mile north of this present disposal plant. There was then some pollution in that water, although I re-

member no distinguishable odor. I never noticed any color to the water at that time prior to 1923 or the deposit of any solids.

I judge that reasonable rental for the plaintiff's land in the condition of the stream prior to the construction of the sewer plant would be $6.00 an acre. I think it would have had at least that rental value, assuming good water, any time within the last five years, although farm rentals are just a little cheaper now than they have been.

On the largest portion of my land we raise grain, a part of it is pasture for grazing purposes. It is suitable for a dairy farm and partially used for that now. The creek affects the suitability of my land for dairy farming.

On my farm I usually don't notice any odor until I get within a 100 feet or 100 yards of the creek. I never noticed it up at the dwelling, approximately one-half mile away. I have noticed it passing along the road to my farm just north of Mr. Dickey's land, a distance of not quite a quarter of a mile and have noticed it when the wind was in the south that far. The corn land part of my farm runs right down to the creek and it is necessary for my tenants to go there and farm that land. My farm is, I think, just a quarter of a
66 mile from the west limits of Harrisonville. My residence, at which I do not notice the odors, is at a point marked "X" at the north end of the land marked A. R. Elder, but I have noticed the odor in driving along this
67 road, the road crossing the railroad tracks at the point marked "Y", when the wind was in the south. I did not rely entirely upon this creek for the water supply on my farm. I dug a well especially to water my stock, that is the milk cows, although my stock do water out of the pasture. I am informed they come to this well for water. I don't personally know about that. I dug the well only two years ago and haven't occupied the farm since then.

Cross-Examination

I have rented my land for the last two years at $4.00 an acre, although previously I received more. The sewer from the court house that formerly discharged into the creek carried the sewage directly into the creek by a 4 inch tile without any filtration whatever. The corner of the cemetery lies within 25 or 30 feet of the creek. I don't remember whether the creek runs through the cemetery. I only remember that at the entrance of the cemetery it is just a short distance away. I know of Mr. Smith having a slaughter house west of the Kansas City, Clinton and [Bulf] Railroad on

this creek right back of what we call Gulf Pond. This creek at the present time runs clear across the Gulf Railroad and runs up North under the Frisco Railroad and up to what is at the present time the city dam or reservoir and passes through what we call Gulf Pond or at least close by. There is an ice plant along there and just north of the ice plant is the Gulf Pond. The slaughter pen is right on the side of the pond. Possibly the west fence is on the edge of the pond. No, I have never been in the water of the creek above the cemetery, and I haven't seen anybody in it, but I know the water above is not what it is below. I have seen cattle in there on the property below the cemetery but above the sewer outlet. I can't tell anything about the pollution of the stream above the cemetery. The county sewer did discharge into the creek above the cemetery.

I know of a milk plant on Independence Street in the city of Harrisonville. I don't know where it discharges its surplus water. Yes, the cattle eat the grass along this
68 stream and my cattle have been drinking the water. It has been two or three years since I was last down along this creek on the Dickey land. The 18 acres at the extreme north end of the Dickey land is cut off from the remainder thereof by a public highway crossing the railroad tracks at the point marked "Y". All the Dickey land east of the Missouri Pacific has outlet on road separate from the state highway and separate from the tract into which the sewer plant discharges, also the south part of the Dickey land is on a highway.

All of the small streams down there are full of brush and decomposed leaves. The deposit on the bank of the stream of which I spoke was a black substance but what it was I can't tell you. It had some animal fat in it and had a greasy appearance and is on the bank 6 inches to a foot above the water line. Yes, sir, decomposed leaves will leave a black, slimy coating on a cow's limbs. Yes, sir, it is required in dairy enterprises that regardless of stream contamination the udders of the cows be washed. I have noticed this deposit on the creek bank every time I have been to it. I have not been up Muddy Creek recently. I crossed Muddy Creek within the last three years. I didn't notice anything unusual about it. This deposit on the creek bank is an unusual substance. I never noticed it along any other creek. It is a black deposit and offensive. I took a stick and picked it up on the stick and tried to analyze it. It is most offensive in time of low water and is of a skummy nature. I have seen it dried on the stocks' legs and it has an odor at that

time. I have visited the disposal plant twice. I was a member of the Golf Club at one time. The odor from this tank was never offensive except at No. 1 and that was within I suppose 200 feet of the tank itself. I have noticed it on the greens. I never did notice it any further away than No. 7 green. No. 1 green is about 200 feet from the tank and No. 7 green would be 400 or 500 feet.

E. B. Black, Engineer being called as a witness on behalf of the plaintiff testified as follows:

Direct Examination

I graduated in the Engineering school of the University of Kansas in 1906 with a degree of B. S. in Engineering and received the degree of Civil Engineer from the same institution in 1924. I am a member of various engineering societies, having had several years practice in land and ir-
69 rigation survey work and served as assistant masonry inspector on bridge construction on railroads and have been employed as a consulting engineer. In 1910 formed a partnership in Kansas City under the firm name of Worley and Black, which continued until 1914 when Mr. Worley retired, and in 1915 formed a firm connection of Black and Veach. In June 1917 was a civilian construction engineer for the War Department in charge of water sewerage, electric light and power construction at Camp Pike, Arkansas. Later commissioned in the army and attached to the finance division of the Signal Corps and assigned to the War Credits Board having in charge investigation of applications for advances to contractors for war supplies. In August 1918 served as an engineer in charge of construction work in the United States and returned to private practice in December, 1918, in the firm of Black and Veach. Our firm maintains a normal force of fifty or sixty engineers for water and sewage work and specializes in sanitary engineer work. Our practice covers the design of 86 sewage disposal works in 12 states and Hawaii. In Missouri we have had experience in sewage work in some 25 or 30 cities.

I have made some 10 inspections of the Imhoff tank and Town Creek at Harrisonville, beginning on August 11, 1928 and continuing to June 9, 1930. I inspected the creek above the sewer outlet as far as the point where it crosses the Missouri Pacific tracks north of the sewage plant. I refer to a point on Exhibit 1 marked "B 1". I found this water clear, soft stream bed lacking in any deposit indicating the presence of sewage. I took samples of the water and have them

here, to-wit: plaintiff's Exhibit 3 bearing the mark "No. 1". This was collected on November 6, 1928 from a point twenty feet above the sewer outlet. Plaintiff's Exhibit 4, bearing the mark "No. 2" is a sample collected approximately twenty feet above the sewer outlet on August 11, 1929. I also took samples below the sewer outlet, plaintiff's Exhibit 5 marked "1-a", taken November 6, 1928 fifty feet below the outlet, also plaintiff's Exhibit 6, marked "1 B" collected about 150 feet below the outlet on November 6, 1928, also plaintiff's Exhibit 7, marked "1 C" collected by me on November 6, 1928 about 1000 feet below the outlet. All those samples have been in my possession continuously since they were taken. I have never found Town Creek below the sewer outlet
70 other than in a grossly polluted condition. I mean a condition where the water in the creek beginning with the sewer outlet for a distance of twelve to fifteen hundred feet has contained black deposits or the dark gray deposits characteristic of sewage pollution and a number of pools actively septic, that is undergoing putrefaction processes. This I determined by the odor and the active appearance of gas upon the surface of the creek, that is gas bubbles coming to the surface. Above the water line there appeared deposits left by rains which have washed the deposits upon the bank. These deposits are quite noticeable. This creek is a succession of pools and riffles and the water level, excepting at times of rain, remains almost normal, that is at the same elevation. These gas bubbles have always been apparent immediately in the sewer outlet and below it and I have observed them for the full length of my inspection about 1500 feet below the outlet. I notice the odor typical of sewage, that of sulpher and of hydrogen. Whether or not the odor is noticeable depends on atmospheric conditions as well as conditions of sewage. It depends partly on the wind. We have determined the biochemical oxygen demand of this stream above the outlet from samples collected on May 25, 1930 and June 9, 1930. We found that a sample collected approximately 100 feet above the outlet on May 25, 1930 contained 4.4 parts per million of dissolved oxygen. Also in another test on the same samples at the end of five days it still contained 2.5 parts per million of dissolved oxygen. Also we made a test on a sample collected at the same point on June 9, 1930. This sample showed a dissolved oxygen content of 6.4 parts per million and five days later 4.4 parts per million. A stream containing 4.4% dissolved oxygen has not been grossly polluted by sewage. It will sustain fish life. 4 parts per million being used as the minimum to sustain fish life. Such water is fit for the consumption of cattle. We also

took tests below the outlet, one a sample collected on May 25, 1930, sixty feet below when we found its biochemical oxygen demand was 35 parts per million and a sample collected the same day some 1200 feet below showed such a demand of 80. On June 9, 1930, again a sample collected 60 feet below showed a biochemical oxygen demand of 100 parts and a sample taken some 1200 feet below showed a demand of 75 parts per million. The sample collected some
71 1200 feet below on May 25th was examined for dissolved oxygen and found to contain none. Such water could not sustain fish life. It indicates or is proof positive of organic pollution. In the case of Town Creek there is but one conclusion and that is that the pollution is from sewage.

The volume of Town Creek would have to be increased from forty to fifty times its present volume in order to take the present sewage flow and still leave in that water a sufficient amount of dissolved oxygen or two parts per million below which dissolved oxygen content we may expect and most certainly get odors. The biochemical oxygen demand test is the only one from which such calculations can reasonably be made. If there is a sufficient volume of water it may take a given quantity of sewage without pollution but there is not any such quantity in Town Creek as to take without pollution the discharge from the Imhoff tank. It would require a volume of water forty or fifty times larger.

It is possible to treat the sewage of Harrisonville so that it may be discharged into a creek of this size without pollution. There are a number of such treatments. All sewage treatment is purification or oxidation, whether by dilution, by being discharged into a stream, or by the treatment under controlled conditions that work as a matter of oxidation.

"Mr. Barnett: (interrupting) Just a moment. Let me interrupt a minute. I assume that it is not necessary for me to make these objections along in order to preserve our theory of law as applicable to this case and what is not proper evidence here. We object, of course, to any line of testimony tending to invade the right of the city and its legislative representatives to determine upon the type of sewage plant that shall be used. That is a matter within the power of the city to say, and of course, if having said so, the type of disposal plant adopted inflicts any damages, which of course we deny, then that is a matter of recovery on the part of the person in-

jured, but we do object and we have in the beginning of this case objected and we continue to object throughout. To save time I shall not repeat the objection to any effort on the part of the plaintiff in this case to introduce evidence here tending to show that possibly some other type of disposal plant or some supplementary disposal plant or some other
72 method of treating this sewage would be less likely to cause pollution. We insist that that is a matter within the province and discretion of the city and its representatives.

"The Court: Objection overruled. You may proceed".

73 (To this ruling and action of the court the defendant, City of Harrisonville, at the time duly excepted and still excepts.)

The witness continued:

The methods ordinarily employed to so reduce sewage that the ultimate outflow will not pollute a stream are to use, first, an Imhoff tank, which serves for preliminary treatment. Supplementary to this there are used what is ordinarily known as sand filters, trickling filters or activated sludge. Those are the three types. In Harrisonville there is used only the preliminary treatment of the Imhoff tank. Such a treatment cannot dispose of sewage so that the outflow will not be septic. By preliminary I mean the extent to which the treatment of a tank of this type goes. The final purification is either carried on by the body of water into which the sewage is discharged or by a secondary refining plant or not at all. It is not possible to operate the Imhoff tank of the City of Harrisonville so that its outflow will not pollute Town Creek. Plaintiff's Exhibit 8 is a photograph of this Imhoff tank and a part of the sludge dry bed below that tank taken by me on August 11th, as are also Exhibits 9 to 14 inclusive all taken on August 11, 1928. The Imhoff tank is built for the purpose of settling out the solids which will settle out from the sewage in a comparatively limited time, say in an hour or two hours, and the immediate passing on out of the tank of the liquid from which those solids have settled. This particular type of tank is divided into two stories, the upper stories or settling compartments and the bottom compartment or a sludge compartment. Solids have settled from this fresh sewage fall down along the sloping concrete floors and thence through a slot or opening in the bottom of each settling compartment into what is known as the sludge digestion chamber in the bottom of the tank, in which the fermentation and putre-

faction of the solids takes place. The gas arising from such changes within the settled sewer or the sludge is sealed from the settling compartment of this tank, or settling compartments. There are two in this case—by the nature of the construction of this vent through which the sewage falls. The gas presumably collects to one opening which is the gas vent or the gas opening shown in these pictures as the central compartment or opening at the top from one end of the tank to the other. The results of Imhoff treatment depend a great deal on the sewage and the sufficiency of design of the
74 tank and its proper or improper operation. In case of a sufficient design and proper operation the maximum result that may be expected from an Imhoff tank would be a 55 or 60% reduction in putrescible matter.

I have examined this particular tank and find that on present day requirements it is probably capable of taking care of a population of 1,000 in the matter of its sludge digestion chambers. From 1200 to 1500 people were probably connected to this sewer in the fall of 1928. I also found that in the case of this particular Imhoff tank raw sewage was passed directly from the outfall of the sewer to the stream without going through the tank. That was either some defect in design or operation, and that from the odors of hydrogen sulphide, at times, that there was septic action in the settling compartments of the tank coming up through the settling compartments and during the first visit I made to the plant the neglect of it was very apparent. Exhibits 8 to 14, show grasses, weeds and tomato plants growing in the sludge bed and in the sludge in the gas vent compartment of the tank. Such a condition does not exist in a well operated plant. Later I noticed a material improvement. The weeds had been fairly well cut down, the tank cleaned up and no weeds were growing in the sludge in the gas vent or in the sludge bed. At the same time I examined the creek. There was no difference in it from my earlier observation. The improvement in operation did not affect the final maximum reduction of putrescible matter that you can get through such a plant. This plant is constructed so that raw sewage may be passed directly around the plant into the creek.

Of course, the best designed system can fall down unless properly operated. Effluent from any of the plants that I have mentioned, that is activated sludges, sand filters and trickling filters, could be such that it could be discharged into Town Creek without the creation of a nuisance or any condition unfitting the creek for stock water. The outflow from

the plant would be relatively clean and without offensive odors. This activated sludge plant or sand filters, or trickling filters is what is known as a secondary, or final type of plant and this present Imhoff tank with some changes in the system of baffling can be used in connection with such a secondary plant. The cost of adding such a secondary system would be $25,000 to $30,000.

I am familiar with plants in towns about the size of Harrisonville. The following are some of the towns that have bought the primary and secondary plants, and the populations given are according to the 1920 census reports. These towns in Missouri are, Hamilton 1689, Odessa 1786, Fayette 2381, Plattsburg 1719, Ridgeway 8012, Humanville 1765. Higginsville 2724, Cameron 3284, Macon 3549, Farmington 2000. There may be others. Of these towns the plants designed by my firm are at Cameron, Farmington and Plattsburg. It would take the City of Harrisonville from two to four months to construct such a plant.

The last examination I made of Town Creek was on June 9, 1930 and I found then deposits like those in plaintiff's Exhibit 5. The black deposit in the bottom of the jar, plaintiff's Exhibit 5, I also found in the creek on June 9th in sufficient quantities that any particular agitation of the water in the pools would stir it up and make the water black. In the 10 examinations I have made of this creek I have found the conditions substantially the same.

Cross-Examination

The first knowledge I have of this stream is from an examination I made August 11, 1928, when the sewage disposal plant was in operation and the comparison which I made then and on subsequent occasions were comparisons between the character of the stream above the sewer outlet and below it. I know nothing of the character of the stream before the erection of the Imholff tank. It is an advantage to treat sewage through an Imhoff tank rather than running the raw sewage into the stream even without secondary treatment. Of course there would still remain at least 40% of putrescible matter in the effluent dumped into the creek without secondary treatment. That is a thing which is inherent in the character of this tank and this treatment even when properly operated. That was true from the very day that the tank was first built and put in operation. Nothing more could have been expected of it.

The water of this creek above the outlet, as well as below, is in my judgment unfit for human consumption. The city of Harrisonville is located on an eminence. This creek
76 may wind around the city even on the east side and then the north side long before it gets to the Dickey property, but I haven't followed it around on the north side or the east side. The location we are considering now, the Dickey property, is on the west side of town. I know nothing about what sources of contamination may be from my own observation up stream from the place where the creek flows under the Missouri Pacific tracks only the plaintiff's land.

I do not mean to say that raw sewage continuously flows into the creek without treatment in the Imhoff tank, but merely that I have seen it go directly to the creek and not go through the tank. That was on August 11, 1928, and again on August 19, 1928. I don't know that I have ever seen that since, although I have made some ten examinations. The sewer system of Harrisonville consists of a collecting system in the city and a line of tile leading from the city in one final main to a point a short distance before it reaches the Imhoff tank where it reaches a receptive chamber which has a manhole. There are two conduits leading from this reception chamber, one leading to the Imhoff tank and the other leading around the side of the Imhoff tank. In proper operation this latter conduit is kept closed so that the sewage flows through the bank. This might be an emergency feature but it was not being operated as such when I saw it. It is not good construction and is expressly eliminated by some State Boards of Health. Of course it would be impossible to make any repairs to a compartment of a tank such as this without either stopping the sewage flow somewhere in this collection system or bypassing it. It is bad construction because there is no particular reason for such a bypass which can be operated at will and may therefor create a nuisance by passing raw sewage around the tank straight into the stream.

I had no connection with this matter in 1923 and I know nothing about whether clay from the newly constructed sewer plant was washed down the tiles in sufficient quantities to stop the sludge exit and make it necessary to bail out the entire plant and I know nothing about using this bypass at that time as an emergency matter. The Missouri State Board of Health is not among those condemning this system of bypassing.

77 I took samples on every visit to Harrisonville and took them in this manner. I wore rubber boots so I could get down into the stream. The samples above the sewer outlet have been taken either in the running water or in the pool at a point where I could easily reach it. The bottles had been washed out prior to taking the samples, and the samples collected without touching the bottle neck with the hands and corked and marked and immediately brought back to my office. There are no twigs or leaves in the samples taken above the outlet, although I could have put twigs or leaves in those also. There was plenty of such vegetation above the outlet. It is true that I placed these twigs and this vegetation in the samples taken below the outlet to collect hereon the impurities to indicate the presence of sewage and that I might have had such twigs or vegetation in the samples taken above, but I didn't because there wasn't any sewage above to attach to the twigs. The samples I took below the outlet I took where I got a quantity of vegetation along with them and those I took above without getting any vegetation in them. Exhibit A I took near the bank because it is a considerable pool, the depth is uncertain—I stirred up the stream, stirred up the accumulations in the bottom of that pool in taking that sample in order to get a fair cross section of what deposit might be on the surface, I mean on the bottom, the same thing is true of Exhibit 6. As I recall Exhibit 7 I had to stand on a fallen log across the stream, the water was flowing rather swiftly. Exhibit 3 was taken near the edge of the creek. It was quite muddy at that point and there was only a slight flow of water. And then I had to get out into the mud and take this sample in water that I should judge was less than 6 inches deep at the point where I took it. I didn't stir the bottom of the stream bed, but it was plain ordinary mud, clay without deposits. In taking Exhibits 5 and 6 I stirred up the sediment of the stream but did not do so in taking Exhibits 3 and 4. Yes, sir, there is a considerable amount of vegetation all along the stream and down in it, twigs and leaves, and ordinarily it is a sluggish stream. It is true that sometimes decayed vegetation in a creek will send up gas bubbles. Roughly speaking I have taken 50 or more samples. Later samples were not taken at the identical place where previous samples were taken.

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78 W. G. BRYANT

W. G. Bryant, called as a witness on behalf of the plaintiff testified as follows:

I am local farm manager at Harrisonville for Mr. W. S. Dickey and live in the farm house. It is practically a grazing farm. We have a herd of cattle ranging from 75 to 100. That part of the farm on the west side of the Missouri Pacific is strictly pasture land somewhat rolling and partially wooded with about 120 acres in it. Town Creek runs through the length of the tract, which is L shaped. The condition of the stream below the sewer outlet is very bad, stagnant in pools, black, bubbly in those deep places and often offensive in odor, I live nearly three-quarters of a mile from there and when the wind is in the northwest of a damp morning I can detect the odor at my house. After the cattle wade across this stream they come out with black mud and slime up about their knees and the cows with their udders all matted with that substance. The calves nurse in that pasture. In dry weather the cattle won't stay near this tank at all. The odors are very offensive and they hardly stay up in that part of the pasture. I don't think they drink the water. I never saw them do it. For water they either go above that tank or go way down at the west end.

When some of the cows were getting calves we wanted them out of there because of those conditions. Summer before last three cows slipped their calves and last summer five. The cattle don't seem to do good in that pasture and in the spring of the year they don't shed off until quite late. Some of them haven't shed yet. I don't know what effect it would have on a prospective purchaser to take him over into that pasture. Cattle don't look so good and the odor is disagreeable.

Grand River is about two miles due west. Before this sewer connection was made the water in the creek was good water to supply cattle. They drank it and there was no odor to the creek. The water was clear except after a rain.

This land never has been used to my knowledge for anything except pasturage.

79 Cross-Examination

The cattle now drink water above the sewer outlet and they drink the water in Muddy Creek above the point where Town Creek empties into it. I never saw them drink the water between the sewer outlet and the point where it finally leaves our land. They won't hardly stay up in the north end of the pasture. You hardly ever find the cattle in the neighborhood of the sewer outlet. Yes, sir, these cattle are

registered cattle. Whether a cow will slip a calf even though she has the purest of water is something I know nothing about. I don't know why a cow slips a calf.

LAWRENCE L. VAN HORN

Lawrence L. Van Horn called as a witness on behalf of the plaintiff testified as follows:

Direct Examination

I farm near Harrisonville on the place adjoining the farm on the south and have lived in the vicinity of Harrisonville sixteen years. I am familiar with the plaintiff's land west of the Missouri Pacific right-of-way and with Town Creek and used to own part of that pasture land before I sold it to Mr. Dickey. I have observed the waters of that creek recently. I am around there every few days. Our house is a quarter of a mile away. This spring when it was dry that was a mighty nasty creek. You don't notice the color of the water so much until you rile it up. You can rile it up from the bottom and it is just like ink and then it has at times a kind of soap sudsy appearance. Wherever there is a little drift or anything this foam collects on the banks. The creek has a mighty bad odor. I am familiar with Muddy Creek and the black water I speak of in Town Creek. We fished for craw dads in Muddy Creek below where Town Creek comes in. The first this year was along in April. We got mighty few crawdads and they were in mighty bad condition. We made two or three drags in different places and there was so much waste in the bottom of the creek and such a vile odor that we left. We went about half a mile back on Muddy Creek from its junction with Town Creek, and seined out all we needed. A half bushel I suppose in two or three drags. Grand River is about three miles from Harrisonville. Before the sewer plant was built this creek used to be as nice a little creek as you would want. The water was fine, the cattle drank it, and lots of fish there at one time. Yes, sir, I have caught
80 fish out of the creek. That was before the disposal tank was constructed. There wasn't any odor there at that time and the water was as clear as any of these creek branches in the county. That is, just ordinary creek water.

Cross-Examination

There are a lot of logs and brush in the creek. There are a lot of dead leaves, decomposed leaves in the creek. That you will find more or less in any creek, and when you step down

into those old leaves gas bubbles will come up. That is true of this creek too. There is no rock bottom in this creek that I know of. We kept cattle in it when we owned it. I knew of the incident before the disposal plant was built when the stock along the creek became sick and a good many of them died. I haven't paid any attention to whether any of them got sick or died since the sewer was put in, although I knew of Mr. Dickey losing some cattle. (I know that there is a disease in herds of cattle that will cause cows to slip their calves.) I was up in this Dickey pasture only two or three weeks ago. It has good blue grass and it had been eaten off close. I have been all over the tract and there is usually cattle in there. I never paid any particular attention to how close they ate the grass. I have seen the cattle up in the upper part of that pasture. Yes, I know where the slaughter pen is up the stream. In the winter time they butcher quite a bit there and butcher hogs there in the summer time. Yes, sir, I know where the creek runs within some twenty or twenty-five feet of the graves in the cemetery. The stream goes right along the south side of the cemetery. I know that there has been a county sewer in there although I didn't know just where the outlet into this stream was. I knew there were some places on the square there that were served by the sewer.

E. R. Logan

E. R. Logan called as a witness on behalf of the plaintiff, testified as follows:

Direct Examination

I live about a half mile west of Harrisonville on Judge Bruce's farm. This is the fourth year there and I have lived around Harrisonville all my life. My brother and I rent the Bruce farm. The stream that runs through Mr.
81 Dickey's land after leaving his property runs through our farm, coming in and out of our land a time or two. The stream runs through the pasture where we keep our cows. The water has an awful strong odor in dry weather and has a kind of greenish skum on it when the water is low and along the edge of the water a kind of black color. That's the condition of the stream where it crosses our land a half mile or more below the sewer plant.

"Q. Do you have any water supply for the cattle on your land other than this creek?

A. Well, our milk cows, when they come up at night we water them at the barn. We have a well and cistern there.

Q. These cows drink at the barn?

A. On hot days they always go out to the water trough.

Q. How is that?

A. On hot days they always go out to the water trough and drink in the evening when we get them up.

Q. Now, have those cows been in the pasture where this creek is? A. Yes, sir.

Q. And they have had a chance to drink out of the creek?

A. Yes, sir.

Q. And when they come up to the barn, they go to the water trough and drink there?

A. On hot days, yes, sir.

Q. When was that well built there?

A. Well, the well has been there a long time. The cistern has been there about two years. I think". It was built for watering stock. I was away from Harrisonville just before the city's disposal plant was built, but when I was a boy that stream seemed to be all right. Although, of course, in dry seasons the creek would go down and have a few holes in it and wouldn't be so very good. I never noticed any odor there at the time, although there may have been and in dry weather when the water was low there would be in those times a green skum on it, but there was no black in it, that I ever noticed nor any of the deposits on the bank that I speak of. At the present time in a dry spell I can notice an odor 100 yards or maybe 150 yards away from the creek.

Cross-Examination

It is true of any stream down there that when these small streams are filled with logs and brush and leaves there is an odor from them on a real hot, dry day. This is just mud bottom creek, rebuilt soil and I have been in pretty near
82 every pool in the whole creek one time or another. It has always been true that where cattle would come out on the bank in a muddy place they would have the water marks on them, and the gumbo, or leaves. We have 29 head of cattle and seven horses in our pasture. 14 of the cows are milk cows and 15 of the cattle are not and they water at this creek. On hot days the 14 cows who have water up in the barn sometimes come and drink in the evening and sometimes not. At night we keep the cattle up in a little pasture there at the barn. That is where we furnish the water which we pump for them each day, fresh water. I have rented this

pasture and one other pasture besides this several years ago in the neighborhood of Harrisonville and I have heard people discuss what they are getting for pastures around there. That price is around $3.00 an acre, some a little higher and some a little lower. I don't see why the cattle on the Dickey land west of the railroad shouldn't take water and drink from Muddy Creek. No fence or anything to keep them from doing it. I never knew of any sickness along there among our cattle since the sewer system was built or before that.

At this point the witness was interrogated concerning the presence of a slaughter pen on Town Creek and plaintiff's counsel made the following statement.

"Mr. Hazard: If your Honor please, I think we might save time now. I do not know whether there is a cemetery or a slaughter pen or an ice plant and some other things up there, but I take it that for certain legal purposes they want to prove that they are there. Now, they may bring on the city engineer or any other official who says they are there, and that ought to be the end of it."

The witness continuing testified. We have had no sickness in our herd since this sewer system was put in and our cattle have been drinking this creek water.

The farm I rent from Mr. Bruce has a house and barn and sheds, hogshed, tool shed and is cross fenced. There is 197 acres and we pay cash rent, $800.00, practically $4.00 an acre. About ninety acres of the land is cultivated land and the cultivated land is more valuable than pasture land. There are no improvements on the Dickey land west of the railroad except the cross fences for boundary fences. The land we rent is more accessible to the road than the Dickey land west of the railroad.

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83 CHARLES A. DUDLEY

Charles A. Dudley called as a witness on behalf of the plaintiff, testified as follows:

Direct Examination

I live seventeen miles east of Kansas City, and I am in charge of the farms that are owned and operated by Mr. Dickey. I have been going to Harrisonville every two or three weeks since 1919. This pasture west of the railroad is pasture land, wooded with lots of good blue grass in it and

very poor water at the present time. The water is polluted from the sewer system of the City of Harrisonville. It is black and gummy with a lot of human sediment in it, polluted awfully bad. There are odors that you can detect three-quarters of a mile away when the wind is in the right direction. Muddy Creek too is polluted more or less after the big rains have backed the water up along the bank above
84 the junction of the two creeks. The water in Town Creek before the construction of the sewer was all right and the cattle drank it. The color of it was like most any creek, fairly clear in the pools. Last year we had five cows slip their calves and this year three. The cattle in that pasture don't thrive like they should. The calves don't. They don't shed off like they should, and after the cattle has crossed this stream their legs become muddy and their udders muddy, and in several instances the hair has come off of their legs from this mud. The mud is black or bluish like a hog waller. These are blooded Hereford cattle offered for sale. I have taken prospective purchasers into this pasture. The last purchaser down there noticed the odor of the septic tank. In dry weather the conditions I have described prevail all along that stream, from the sewer outlet down to the junction. I am familiar with the rental value of the lands in close proximity to these towns. Versailles, Deepwater, Chanute, Kansas, Harrisonville, Hamilton, several of those places. Close to a town where you have the right kind of water we have been getting $2.50 to $3.00 a month per head for town cows. The special value is due to the proximity of the pasture to the town.

Q. "What would you say would be a reasonable rental value for the creek pasture of the plaintiff west of the Missouri Pacific right-of-way?

"Mr. Barnett: Just a moment. I object to that question for the reason, first that it is made applicable to town cows, by which I understand that he refers to cows owned by individuals here and there in town who pasture them out in the outskirts of town. There is no evidence that this pasture was ever used for that purpose before or after the connection with this sewage system, and I object to it for the further reason that this question of the rental value of that land is not the measure of damages here, even in the event the Court finds that the disposal plant in question is a nuisance because, under the testimony of the plaintiff's own witnesses, that plant was a nuisance from the time when it first began to operate, it is inherent in the character of the plant itself, and

in the nature of the plant itself, it can't be any better than that, and the measure of damages would not be a rental value of the land at all, but would be a measure of damages for some alleged infringement of the rights of the plaintiff
85 by a permanent nuisance, if any nuisance at all in this case."

Upon the assumption of plaintiff's counsel that he proposed to show the properties available for town cows the objection was overruled. To the ruling the defendant City then excepted and still excepts.

The witness continuing testified. I would think this pasture was available for the rental of town cows, because it is close to Harrisonville. For that purpose its rental value is something like $7.50 or $8.00 per acre per year. There is something like ninety acres in this particular pasture. About 150 acres west of the railroad and about ninety in this pasture. This land with good water in it would have had that rental value at all times during the last five years, but as it is, it is not available for that purpose because a man wouldn't want to pasture his town cow there giving milk for his family. It could be so used, however, if the pollution were removed from Town Creek.

"Mr. Barnett: I move to strike out all the testimony of the witness with reference to the pasturage for town cows. No such issue has been raised in the pleadings of this case.

"The Court: I suppose that if this is the question of rental value—I am not trying to decide that now—but I assume that any element that might tend to show the value for any purpose would be available notwithstanding the fact that the evidence shows that it is now and has been used for other purposes. The motion will be denied at this time."

Cross-Examination

Before this sewer system was installed the cattle drank the water all along Town Creek. Now they drink it below this sewer outlet only in times when it is absolutely necessary and that is in the far west end. The cattle graze all over the pasture. In my direct testimony about $7.50 an acre for town cows, I didn't mean to say that any one person would pay that much per acre for this entire tract, and of course whether there was any demand for this pasture for town cows would depend more or less upon the number of town cows looking for this kind of pasture and I have no knowledge about that. I know that about twenty years ago on the prop-

erty known as the fair grounds, the Dickey land on the east side of the railroad, they got about $2.50 a head for town cows. I don't know how many cows at Harrisonville there are on the market for pasturage as town cows, nor
86 how many there have been during the last five years and I couldn't give the name of a special transaction with reference to town cows.

Redirect Examination

We found a small spring in this Dickey land west of the railroad and dug it out the best we could and made a little bank around it in order to furnish water to help the cattle out in that pasture.

Recross Examination

That pond is on the north side of Muddy Creek. We dug it out a couple of feet deep. It is about 12 or 14 feet in diameter. We don't get very much inflow into the pond. Before it was out there was just a trickle of water that came from this spring, just a seepage spring and now making this pond we have about two feet of water. I don't believe that water escapes very much now. The cattle keep it pretty well drank up. When they go to drink there they often wade right out into the pond. No, I don't think I ever saw the cattle standing in the pond in hot weather because it is out in the sun. The cattle might defecate in the pond if they crossed over it. There would be no reason for them to stand in it. The pond does not get foul. I don't think so because there is not enough water left there to get stagnant. The cattle keep it mostly drunk up. Muddy Creek becomes polluted from the backwater of Town Creek after a rain. You can see the sediment on the banks.

W. S. JOHNSON called as a witness on behalf of the plaintiff testified as follows:

Direct Examination

I am Chief Public Health Engineer with the Missouri State Board of Health. I made an inspection of the Imhoff tank in 1925 and again in 1928 and also Town Creek into which the plant discharges. On my first examination I followed the creek around to a point approximately directly north of town. It circles around the west side and then around to the north side of town. It was in about the condition you would expect a creek of that sort, apparently clean. During

a dry period, when the flow is very moderate the water is fairly clean. There was no odor from the water. Below the outlet of the Imhoff tank into this creek it showed marked evidences of contamination, the usual appearances of
87 a polluted creek, black sediment in the bottom and a grayish, filamentous growth on the sides and bottom clinging to the rocks, typical of sewage contamination. This was unquestionably caused by the discharge from the Imhoff tank. Plaintiff's Exhibit 5 looks very similar to the growth and deposit in the bed of the stream below the sewer and is fairly typical of rather gross pollution of a stream with sewage. The condition of the stream was practically the same in 1928. When I examined the stream in 1928 the water just above the outlet was in the same condition as before, fairly clear.

If the biochemical oxygen demand of a stream is negative it shows a lack of pollution, that the stream is in good condition from an organic pollution standpoint. If there is a biochemical oxygen demand of 75 to 100 some two hundred feet below the outlet that indicates conditions of pollution in the creek. A loss of dissolved oxygen in a stream at one point as against a point farther up the stream indicates that in between there has been the introduction of some considerable contamination in the stream, which in the course of decomposition has used that oxygen up, such as sewage.

The Harrisonville plant is in an Imhoff tank with a sludge dry bed known usually as primary treatment. This is simply a settling out process of certain solids in the sewage, that is usually followed, if necessary, by a secondary treatment where a further stabilization of sewage takes place. An Imhoff tank only settles out a certain per cent of puterscible matter in sewage and the effluent therefrom will always contain organic matter that is not entirely stabilized and if in sufficient quantities will pollute a water course.

"Q. Now can the sewage of a tank like Harrisonville's be treated in such a way that the effluent into such a creek will not create the condition of pollution?

"A. Yes, sir.

"Mr. Barnett: Just a moment. We object to that question and ask that the answer be stricken out for reason that the character of the disposal plant, sewage disposal plant, to be adopted is a matter left to the discretion of the city authorities under the powers given to the city and state, and

that, if in the exercise of those powers the city has
88 erected a system which, in any way, is a nuisance, particularly a permanent nuisance, as the evidence of the plaintiff here tends to show, then the party affected has his right for damages as for a permanent nuisance, and it is not within the province of the Court to pass upon the question as to whether the city shall or shall not adopt some other plan of disposal; and we object to this testimony from this witness as we have objected to it from other witnesses."

This objection and motion was by the Court overruled, and to such ruling the defendant, City of Harrisonville, at the time duly excepted and still excepts.

"Q. Have you recommended, as a public health officer, such treatment for the sewage of Harrisonville?

Mr. Barnett: I object to that for the reason it is not material to any issues here what has been recommended. It is only a question of what might be required by law."

This objection was by the Court overruled and to the ruling of the Court, the defendant, City of Harrisonville, duly excepted and still excepts.

The witness continuing: We recommended additional treatment in a report, I think in 1925, to the City of Harrisonville.

There are towns in the state of Missouri, approximately the size of Harrisonville, in which there is complete disposal of sewage. They are Eldon, Hamilton, Higginsville, Kennett, LaPlata, Lathrop, Odessa, Plattsburg, Ridgeway and Unionville.

"Mr. Barnett: May I interrupt at this point? I am not going to object and carry it out further, but I want the Court to know that, according to our theory of the case, what these other towns do is not proper evidence here because the conditions may be entirely different there. They may have human habitations close to the place where the outlet occurs."

The town of Unionville discharges its effluent into a creek approximately the same size or a little smaller than Town Creek. At the time of my observations the condition of the water in that creek below the point of discharge was very good, clear, the bottom of the stream clean and the water in good condition with no such deposits of the character shown in Plaintiff's Exhibit 5 and no odors. We have on
89 repeated occasions recommended against the use of pasturage contaminated with city sewage for cattle,

milk producing cattle, dairy cattle. That is quite a dangerous procedure. You might get contaminated material on the udders of the cows and that may contain disease producing organisms that might be introduced into the milk at the time of milking with disastrous results to the consumer of the milk.

Cross-Examination

I was not the engineer of the State Health Department at the time this plant was erected and in going over the correspondence I haven't found any formal approval of the plant. Although we do have some correspondence between the city's engineer and Mr. Putnam, the engineer of the State Board who preceded me, relative to size and capacity. Yes, sir, the attention of the State Board was called to the intention of the City of Harrisonville to put in this disposal plant. The Imhoff tank treatment represents an advance in the matter of sewage disposal even for primary treatment over what was commonly known as the old septic tank. These Imhoff tanks were first built in Germany and brought over to this country about twenty or twenty-five years ago and installed as an improvement upon the old septic tank. Yes, sir, it is true that the requirements of our department have become more rigid concerning the treatments of sewage since 1923, when this plant was installed, and things required today were not required in 1923. Also is much better to use this Imhoff system than to dump the raw sewage into the stream outlet. I never had my attention called to Town Creek before 1925 and my comparison has been of the waters above and below the outlet since that time and since the tank has been discharging into the creek. I have no personal knowledge of the character of the creek before the construction of this plant. Yes, sir, probably the collection of the sewage in a central system of this kind and a deposit of it through the lines would probably decrease the amount of waste that would ordinarily drain into this creek above the outlet. Yes, sir, the city of Unionville, of which I spoke, made the installation of its plant since 1923 and both the Unionville and LaPlata plants have been installed since 1923. I haven't the exact date. There are a total of eighty-four sewage treatment plants in the state and of that eighty-four twenty-three have both primary and secondary treatment. The remainder have only primary treatment, either Imhoff tanks or
90 separate sludge beds. About 70% of the cities have the primary system. This includes all the treatment

plants in the state but does not include St. Louis, Kansas City or St. Joseph, which have no treatment but discharge the raw sewage into the river.

Redirect Examination

By Mr. Hazard:

"Q. Mr. Johnson, when you say there are twenty-three out of eighty-four that have both primary and secondary treatment, that does not mean that all of the remainder need both primary and secondary treatment, does it?

A. No, sir.

Q. For instance, as Kansas City and St. Louis and St. Joseph and in fact, any city on a large stream or river, may discharge its sewage directly into the river without any treatment whatever, may it not? A. Yes, sir.

Q. Have you any figures to show what the percentage of towns have both primary and secondary treatment where it is needed?

A. Well, in this same article which I quoted before, our summary indicates there are about twenty-seven towns in which the treatment is insufficient. That is, either they haven't got any treatment at all or it isn't sufficient treatment. They have only primary treatment without the secondary.

Q. Twenty-seven out of eighty-four have insufficient treatment? A. Yes, sir.

Q. And is Harrisonville one of the twenty-seven?

A. Yes."

There was in the year 1923 the improved method of both primary and secondary disposal and it would have been possible to have constructed at that time a plant which would completely reduce the sewage. According to our regulations now in effect the city must have the plans approved before the contract is let and also an approval after final inspection before the work is accepted. The state board will not give an approval without reserving the right to inspect, supervise and pass on the plant at a later date. Our present regulations which require approval by the State Board of Health were not in effect in 1923, but passed by the Board on April 3, 1928. The article I spoke of in which I noted twenty-seven out of eighty-four cities in the state as having insufficient disposal systems was an article which I personally published in the Sewage Works Journal, October 1929, based on data collected during my regular official inspections of various plants in the state.

91

Recross Examination

"By Mr. Barnett:

Q. When you spoke of twenty-seven of the eighty-four cities having insufficient disposal systems, you were reading from some article there. Now, as I understand it, that is an article which you yourself wrote? A. Yes, sir.

Q. And you were expressing simply your personal, individual judgment about the matter. That isn't any rule or regulation which has been adopted by the Health Department?

A. This article, I might explain, is the result of mine and my assistant engineers' examinations of all the sewage plants in the state. That examination has probably been taking place for the last three or four years, and as a result of that inspection we come to certain conclusions, regarding the plants as to their adequacy and their methods of operation, etc., and this article is based from that information that we secured from those surveys.

Q. And your function as State Health Officer is to have in mind the matter of the general public health, isn't that it?

A. Yes, sir.

Q. It isn't the function of your Department to go into the matter of cattle diseases or anything of that kind except as it might have some reflection upon the health of human beings?

Mr. Barnett: That is all.

Redirect Examination

By Mr. Hazard:

Q. This report from which you are reading, is that the basis upon which the State Board of Health makes its regulations?

A. No, the regulations under which we are operating now were written before this report.

Q. Well, what I mean to say is would such a report as that, based upon such a study as you have described, be the basis for regulations by the State Board of Health?

92 The Court: Even so, it would be little more than a memorandum, of course, because it emanates from him; he is expressing the same idea here.

Q. I simply want to bring out, of course, that it is not just a report which some one writes out of the blue, but is based on a study of the conditions.

The Court: You can ask him whether it is or not; I don't know whether it is a report or just an article. He called it an article.

Q. What is the basis of the report from which you are reading?

A. Under our regulations, we manage to make an inspection of each sewage plant in the state each year, and after each inspection that data is properly collected regarding the plants and filed. Now, this article is simply a summary of that data we secured during our regular inspections and surveys, which are made in accordance with our regulations.

Q. Based on the data secured in the survey?

A. Yes, sir.

Q. It is not an argument in any sense of the word?

A. No.

Q. What is that volume you have in your hand there?

A. This is the Sewage Works Journal, October, 1929.

The Court: Was it ever submitted to the State Board of Health, that article?

A. You mean the board members themselves?

The Court: That article, yes.

A. The board members?

The Court: Yes.

A. No, sir.

Q. You referred to the present regulations as requiring approval for the plans for sewage disposal plants from the State Board of Health. Was such a regulation in force in the year 1923?

A. No, these present regulations were passed by the Board April 3, 1928.

Q. And you do not know whether there were such regulations in force in 1923 or not? A. No.

Mr. Hazard: I think that is all.

93 Recross Examination

Yes, sir, the plant erected at Unionville and the one at LaPlata which I have designated as satisfactory were erected by the same engineering firm which built the plant at Harrisonville.

CHARLES F. WOODLING.

Charles F. Woodling called as a witness on behalf of the plaintiff testified as follows:

Direct Examination

I live in Kansas City and my business is general contracting, in which I have been engaged for twenty-six years. I

have examined the creek on the plaintiff's land at Harrisonville from the septic tank outlet to the lower boundary of the farm with a view to determining the cost of removing the deposits that are there at the present time and of cleaning the pollution out of the stream. I have had experience in work of this general character. We excavated a simi-
94 lar ditch all around the New Orleans race track for the same purpose, to take off offal, drainage water, sewage water from the various utilities used around the track, into a canal. The deposits in this Town Creek would not be removed naturally.

"Q. Now based on your experience as a contractor and in doing work of similar character, have you estimated the cost of removing the deposits and cleaning up the pollution in this particular stream from the septic tank to the lower end of the Dickey farm?

"A. I have.

"Mr. Barnett: We object to this question and this line of testimony for the reason that, if any nuisance exists here at all, under the plaintiff's own evidence it is a permanent nuisance and the measure of damages is damages for a permanent nuisance, which would be a decrease in the value of the land caused by this structure, and we object to this line of interrogation for the reason that it is calling for an improper measure of damages.

The Court: I may say, so we will not have to worry with objections, there is no question, if you state the law correctly, in those cases where there is a permanent damage to property and where the necessity requires the use of the property. I think in this case in 244 Missouri, Smith vs. Sedalia, the court states what the law might have been there in stating the case, when it says that 'No practical way has been demonstrated for disposing of this sewage other than by the use of this water course, which is the natural drain for that purpose of that city. Plaintiff attempted unsuccessfully, we think, to show that septic tank would satisfactorily dispose of the sewage'. Then of course they discussed the proposition that they rejected the evidence as being insufficient to show it might have been so disposed. Now I assume that counsel in this case contravert the question of the permanent invasion or encroachment upon this land. If that is true, then unquestionably you state the law. If the city in disposing of its sewage must necessarily use this water course then that is the end of it; plaintiff is not entitled to recover in this action, his remedy is by damages as you suggest. But if there is a means by which this sewage can be

reduced where the city does not have to encroach on
95 his land and that is counsel is seeking to show, then, of course, the plaintiff would have a law suit here. That is the whole issue here in this case."

(To the ruling of the court plaintiff then duly excepted and still excepts)

Witness continued:

I estimate that it would take around $3500.00 to clear the creek up and clear the pools out and cut a new by-way by the pools, that is, on account of the pools being hard to clean out. It would cost less money to cut a new creek by the pools because it is hard to determine how deep that water in the pools is and the sum of $3500.00 in my opinion is a reasonable and fair estimate of the cost of such work.

Cross-Examination

I estimate that it would take about 8500 yards of earth removal. In places my cost would run from 30 to 40¢ per cubic yard. Other places where we would have to wash we would have to bring in a pump. The ditch would be about 4 feet deep down from the soil level, in some places 5 feet.

"Mr. Hazard: With the exception of introducing a copy of the Articles of Association and Incorporation of the plaintiff, if we deem it necessary, and which counsel for the defendant agree that we may introduce later, the plaintiff rests.

"Mr. Barnett: At the close of the plaintiff's case, the defendant, City of Harrisonville moves that the action be dismissed for the reason that, under the pleadings and the law and the evidence, it is shown that the plaintiff has no such cause of action as plaintiff endeavors to recover upon here; that under the evidence it appears that this Imhoff tank is a permanent concrete structure, the lines and pipes leading to it are a part of the general sewer system of the City of Harrisonville, and that the damage, if any, existing, which the plaintiff claims here, is damage which is inherent in the very use of this plant and has been from the beginning, and that the nuisance, if any, arising from the use of this plant is not such as may be excepted to be discontinued in any way, except by additional work, the application of further work upon the plant in some manner or upon the entire problem of sewage disposal for this
96 town of some 2,000 people according to plaintiff's own petition; that the nuisance, if any, is a permanent

nuisance, that its character as a nuisance was discovered immediately after the operation of the plant, and that, if any remedy at all is to be granted to the owner of the property upon which this effluent was discharged, that remedy is an action for damages as for a permanent nuisance under the evidence in this case and it was clear that there is no ground for application to a Court of equity and there have been shown no damages as of the character to support any recovery as for a permanent nuisance and for that matter, not any sufficient evidence if we were to pass to the theory of a temporary nuisance to support recovery upon the basis of a temporary nuisance. For that reason we move the action be dismissed.

To these grounds of my motion, I wish to add this further ground; that insofar as there is properly any issue before the court concerning some plan for modifying or analyzing the present sewage disposal plant the evidence is wholly insufficient on the part of the plaintiff and fails to show that the City of Harrisonville is financially able to construct a plant which plaintiff advocates as supplementary, and for the further reason that under the Constitution of the State of Missouri the City of Harrisonville is without the means with which to make this additional improvement.

"The Court: Motion denied.

"Mr. Donaldson: Defendant, Missouri Pacific at the conclusion of all the plaintiff's testimony moves for the dismissal of the bill as to the Defendant, Missouri Pacific, for the reason the bill does not state facts sufficient to constitute an action against this defendant, the pleadings disclose there is no right of action against this defendant herein and that the evidence has wholly failed to show any evidence against the defendant, Missouri Pacific."

This motion the court denied.

(To this ruling and action of the court with reference to the motion of the defendant, City of Harrisonville, and the motion of defendant, Missouri Pacific Railroad Company, the defendants and each of them at the time duly excepted and still except.)

Thereupon the defendant, City of Harrisonville introduced evidence as follows:

97 W. B. ROLLINS, called as a witness on behalf of the defendant, City of Harrisonville, testified as follows:

Direct Examination

I am a consulting municipal engineer living in Kansas City, Missouri, a graduate and post-graduate of the University of Missouri, Engineering Department, class of 1903. I became engaged in municipal work in 1905 and for three or four years was associated with other firms and in 1908 began business for myself, and since that have designed and supervised the construction of approximately five hundred municipal proceedings in Missouri, Arkansas, Oklahoma, Kansas and Iowa. Among these plants were the sewage disposal plants, one located at Unionville and the other at LaPlata mentioned by the State Engineer, Mr. Johnson.

My first connection with the matter of sanitary improvements of Harrisonville was about 1914, when we planned a plant to take care of the city's requirements. This did not go through and there was more or less agitation about it until 1922 when active steps were taken towards the construction of a complete sanitary sewage system for the city. At the time it was suggested the City asked the State Board of Health to make an investigation and report. Mr. George W. Putnam, then State Sanitary Engineer, made a study and mailed a report to the city under date of January 13, 1923, sending us a copy.

At this point the plaintiff objected to the offer in evidence of the copy of the State report of January 13, 1923, upon the ground that it was not the best evidence and this objection the court sustained and thereto the defendant, City of Harrisonville, at the time duly excepted and still excepts.

Witness continued:

We made a number of investigations and surveys, studying the sanitary conditions, methods of improving them, and in our study we found that there was the old type of septic tank which has been installed at Harrisonville for a number of years, located approximately on the south bank of the so-called Town Branch, and this septic tank carried sewage from the Court House, hotel, all of the uptown district, and a number of private residences that were connected to that private system, which I understand had been built by
98 the county court. Our study revealed that there were more than 100 private sewerage systems in the City of Harrisonville prior to the time that the City at large undertook the construction of a general sewerage system. A great many of these naturally were connected to this line extending from the uptown district to this septic tank,

which was located on the bank of Town Creek, and the effluent from that tank produced a nuisance in the vicinity and also a nuisance in the Town Creek, and it was partly to get rid of this nuisance that the City wanted to construct a general sewerage system to take care of the city at large.

Practically all of the city from the Court House Square north and from the Court House Square west has its drainage into this Town Creek. The south and east portions of the town have their drainage into another creek which flows off into a southwesterly direction, and I think eventually reaches Grand River. I observed Town Creek a number of times before this sewer system was built, and also the other small streams which carried the drainage from the City.

One of the main points desired by the City in having a general sewerage system constructed was to remove the very unsatisfactory condition around the old septic tank, which was located on the south bank of Town Creek. Naturally when the new system was completed and the sewage taken from that, which, prior to the construction of the new system, only had the old Cameron tank treatment and entered Town Creek in a much less purified condition than would be the case with the ordinary Imhoff tank, the condition of Town Creek above the present point where the effluent reaches that creek would be changed, but at that time the Town Creek was very much polluted from the location of the Cameron tank, which was right in the residence district, clear around to the confluence with Muddy Creek, showed signs of pollution. I traversed it time and again from one end to the other and it showed very evident signs of pollution. This was true of Town Creek all the way from the uptown district where the septic tank was located clear down to Muddy Creek. Although it varied in various parts of the creek, this creek also carried surface filth from all of the north and a great portion of the west part of town because of the natural drainage, and it is a very steep incline and heavy rains would wash the surface filth from the
99 north part of town and part of the business district that wasn't fully sewered, and all the west part of town and finally reached this Town Creek and was carried away in this Town Creek, and it was very unsightly and ill smelling from town clear down.

There are four railroads into Harrisonville; the Missouri Pacific runs through and has its station in the north part of town; the Katy has its station in the north part of town; the Frisco has its station in the north central part of town, and the other branch of the Frisco has its station in the

west part of town. This Town Creek took the drainage from the Frisco and from the Missouri Pacific and Katy and eventually caught the drainage from the other Frisco station in the west part of town. The Missouri Pacific and the Katy are on the north side of the creek and the creek flows through the part of the land, through those railroad stations and yards and freight houses. The water in Town Creek was not before the erection of this Imhoff tank and is not now at any place in the creek fit for human consumption.

After the agitation to which I referred previously, followed by a letter from the State Board of Health recommending to the city that they establish a general public sewerage system, we were authorized to complete surveys and prepare plans and specifications. This was in the fall of 1922. An election was held about the first of January, 1923, the first part of the year, and bonds were voted, based on our estimate, which provided only for primary treatment. One of the reasons that we did not design a more elaborate plant, as we have for a number of other cities on the basis that they ultimately might need a more elaborate plant, was that the city's bonding limit would not provide for a more extensive plant at that time than the approximate amount of bonds that were voted. After we prepared the plans and specifications we submitted them to the State Board of Health for approval. We sent them the plans for this system as it was eventually constructed, and in reply we received this letter dated March 22, 1923, marked defendant's "Exhibit A". Mr. F. H. Frauens to whom it is addressed was one of the assistants in my office.

100 Defendant's Exhibit "A".

"Missouri State Board of Health
City of Jefferson
March 22, 1923

Mr. F. H. Frauens,
W. B. Rollins & Company,
Consulting Engineers,
521 Railway Exchange Building,
Kansas City, Missouri.

Dear Sir:

Your letter of February 16th was noted on our return to the office following a period of illness. Due to the press of work in preparing Data and reports for the Legislature, we have been unable up to this time, to check over the plans submitted.

We are pleased to note that you decided on the liberal capacity of one hundred thousand gallons per day, and approve of the general details of the design. We would suggest including in the specification and showing as a note on the blue print 'The sloping walls of the settling chamber to be plastered smooth with a coat of neat cement, so as to leave no projections, ridges or uneven surfaces.' In our inspection of many existing treatment plants, we have found that sludge was accumulating in the settling chamber, due to such defects which caught the settling sewage and gradually caused the filling of this chamber with sludge.

We note that the sludge capacity taken below a horizontal plane eighteen inches below the slots is approximately 1,070 cubic feet, or about one half cubic foot per capita. On the bases of .0052 cubic feet of sludge per capita daily, from a separate system with a sewage flow of fifty gallons per capita daily, and serving two thousand population, this will permit a sludge storage period of only one hundred days.

We prefer to see a minimum storage period of six to seven months, which is about equivalent to a total sludge capacity of one cubic foot per capita.

We note that the outlet of the sludge pipe is only six inches above the top of the sludge bed. With an accumulation of ten and one half cubic feet of sludge daily. This would require drawing sludge every three weeks, if the depth were limited to six inches. We would prefer to see the
101 distance between the bottom of the sludge pipe and top of the sludge bed increased to at least fifteen inches, so as to permit drawing sludge bed increased to at least fifteen inches, so as to permit drawing sludge to a depth of ten inches at longer intervals.

We understand that your contract has been undoubtedly let by this time, and only regret that our illness prevent taking these points up with you earlier. We expect to visit one or two towns in the vicinity of Harrisonville on sewage matters, and would very much appreciate your furnishing us a brief summary of the contract figures for comparison purposes.

Very truly yours,

GEORGE W. PUTNAM,
State Sanitary Engineer."

The plaintiff stated that it had no objection to the letter, defendant's Exhibit "A", which was offered in evidence.

Witness continued:

Concerning the requirement suggested in this letter of the State Board of Health about the sloping walls being plastered smooth, I wish to say that we did that work in the actual completion of the tank. Also we changed the sludge capacity and made it one foot, as Mr. Putnam suggested. The capacity of the plant as built figures 1920 cubic feet. We estimated that there would probably be two-thirds of the city eventually served by that plant, and on the basis of about 2000 population, there would be 1200 or 1400 people, so that our actual sludge capacity was a foot and a half, one and a half cubic feet per capita instead of one foot. A part of the City of Harrisonville is not served by this plant, but by a different type of septic tank, so that the Imhoff tank does not carry the sewage from the entire city, but does carry the sewage from all of the north and west parts of the city. It is only in the last five or six years that the State Board of Health has requested these plans and specifications to be filed and formal approval given before the work is constructed. Prior to that they only asked to be notified so that we have no formal approval such as we receive today in the construction of plants.

102 "Q. Is the capacity of that plant as it was erected there sufficient to take care of the needs of the City of Harrisonville?

A. Sufficient to take care of the population for which it was designed.

Q. And as I understand it, this letter from the State Board of Health required a capacity of one cubic foot per capita and the plant as actually constructed provides a capacity of one and a half cubic feet per capita?

A. On the estimated contributing population to this system. In other words, about four-fifths of the town is contiguous and will be served by this plant."

103 Imhoff tanks have been in use in this state only ten or twelve years, although prior to that they were in use in Germany and some states of the United States. It is only in the last six or eight years that they have been in general use in this state. All health authorities agree that Imhoff tanks represent a marked improvement over the old type that was in use prior to the construction of the new system.

The Imhoff tank operates in the following manner:

The collecting system is composed of vitrified clay pipe, which, in this particular case, was manufactured by the plaintiff. The disposal plant itself consists of the concrete basin, known as the Imhoff tank, which is a hopper bottomed affair. All of the sewage collected by the collecting system is carried into this tank by means of inlet lines from the distributing manhole. There are two compartments to the tank, either one of which may be used without the other. In fact, in the early stages of the operation, we found that the improvement would be made in the operation by cutting off one of these compartments and using the sewage only in the other half of the tank. After the sewage enters the tank, it flows through in a very slow manner, having about two to four hours detention period. During this period the solid matter, a large proportion of it, is settled out into the hopper or digestion chamber as it is called. The liquid from the sewage goes out the other end of the tank over a weir into a trough, from that through into a collecting manhole and from this collecting manhole through the outlet tile pipe line under the Missouri Pacific Railroad track into Town Creek.

An Imhoff tank is supposed to give from fifty to sixty per cent purification; that is, about 50 or 60 per cent of putrescible matter is removed in an Imhoff tank, if it is properly operated. The weir over which the liquid flows into the collecting trough is a very fine straight steel edge and is so set by the use of an instrument that only a very fine film or liquid flows over the entire length of the weir into the trough, giving an opportunity, of course, for the aeration of the liquid as it flows over, and the trough being open at the top also permits aeration of the liquid before it gets into the closed manhole.

104 Page 1 of defendant's Exhibit "B", consisting of three different blue print pages, represents a map of the City of Harrisonville, showing the arrangement of the collecting system of the sewers, and also the location of the disposal plant at the southwest edge of town adjacent to the Missouri Pacific railroad. Town Creek is shown here very clearly, rising in the northeast part of town, connecting with Lake Luna, formerly used by the City as a water supply, flowing through the low land in the north part of town near the railroad stations, flowing under the tracks of the Kansas City Clinton & Springfield Railroad on the west side of town near the Oakland cemetery and thence further southwesterly

until it crosses the Missouri Pacific tracks onto the plaintiff's land. Oakland Cemetery is a cemetery which has been located beside this creek ever since I have known anything about it. The creek generally flows through the low land lying between the railroad stations and the town which all drain into this creek.

The main trunk line shown on this blue print for the north and west part of town is shown by this heavy solid line skirting Moudy Pond and extends on up to a point opposite the north part of the business district. The blue print shows another trunk line branching off at about 300 feet from the disposal plant, which collects the sewage from the south and west part of town. There is a lateral line up Mechanic Street and other streets. Most of the south central part of town is cared for by a little private septic tank, that part of town being too low to get into this district.

Page 2 of the blue print, defendant's Exhibit "B" is a plan of the disposal plant. The circle at the top of the plan is the distributing manhole where the main trunk line from the city enters. The by-pass line, spoken of by Mr. Black, is shown here as the dotted line running straight from this distributing manhole over to another manhole in the left side of the blue print and from that manhole the conduit conducts the sewage or effluent on down to the bottom of this plan in the direction it takes in passing under the Missouri Pacific tracks and into Town Creek. The purpose of this by-pass is twofold. First, to assist the contractor during the construction period and next, after construction to serve as a by-pass for the sewage, if necessary to by-pass it for any purpose. The
105 contractor naturally begins his work at the low point because he wants all the water that gets into the system to run through and get away and he uses this by-pass for that purpose. After construction and the beginning of operation of the plant the valve of the by-pass is closed and the two valves leading to the two compartments of the tank are open, or at least one of them, so that the sewage may flow directly into the tank for treatment. The tank shows three divisions. The plant consists of the sedimentation tank, and of the sludge bed and the sedimentation tank consists of two compartments on the side called the settling compartments and of one compartment in the middle called the digestion compartment. The sewage comes in to one or both of these settling tanks at the upper part of the blue print by the conduits from the distributing manhole and flows

very slowly across the tank with the solids settling to the bottom along the sloping walls which carry those solids to a point directly under the center compartment of the tank. There these solids undergo a fermentation process and the gas rises therefrom until it reaches the surface of the tank in the middle compartment. Those gas bubbles go straight up and because of the construction of the slanting walls of the two outside upper compartments of the tank the gas does not come up through those two outside compartments. At periods of two or three months, as investigation may reveal necessity, the sludge accumulated in the hopper of this tank is discharged from the tank by means of a pipe shown on the blue print at the top of page 3. This cast iron pipe sets down near the peak of the hopper bottom. By opening this valve in the outside called, "Gate valve", the pressure of the water above exerts force on the liquid mass, forcing it up into this pipe and out onto this sludge bed, a cross section of which is shown at the top of page 3 of the blue print, Exhibit "B". This sludge bed consists of sand and then pea gravel under the sand and then crushed stone under the pea gravel and finally a collecting system of tile which collects the water as it drains off the sludge, which has been discharged from the disposal plant, and that liquid, of course, is carried over to the same manhole shown at the left of the blue print on page 2 and from there discharged by the effluent line from this manhole by conduits under the railroad right-of-way and into Town Creek.

106 This description has followed the operation of the disposition of the solids. Now then the liquid sewage which flows into the tank from the distributing manhole flows very, very slowly across the tank until it comes to an adjustable weir on the far side of the tank and flows over this weir by a very fine line and into a collecting trough just beyond the weir and from this trough by conduits over to the manhole at the left of page 2 of the blue print and thence as the effluent from this tank by tile conduits across a railroad right-of way and into Town Creek.

Returning to the sludge that is left on the sludge bed. The operation is to allow this sludge to dry when it is then taken off and used as a fertilizer. This drying process depends upon the weather and usually takes a week or so. It becomes a dark gray powder, practically odorless and is used as fertilizer, although in cities of the size of Harrisonville the volume of the sludge is not sufficient to be commercially valuable.

Before this plant was completed, a month or two before, any sewage was conducted through this system Mr. Dickey's superintendent made a complaint to the city, stating that the city sewage was damaging his water supply. When he was told that the system was not completed and wouldn't be for another month, he quieted down. I was in the employ of the city all of this time under the city officials. After the plant was constructed we filed a set of rules which were submitted to and approved by the State Board of Health for the operation of and attention to Imhoff tanks. We filed these rules with the City and dropped in occasionally to see whether the plant was receiving the attention that it should. On one occasion we found that an attempt had been made to remove the sludge from the tank, but that the sludge removal pipe had been clogged at the bottom due to some clay or dirt or other foreign material, which had not thoroughly been flushed out of the sewer lines previously and had gotten in some way. It then became necessary for the city to pump and remove by buckets and other means practically all of the sludge, both that which was properly digested and that which was not, and discharge it where they could; part of it went into the pipe line and part went out on the ground. That was, I believe, in 1924, about a year after the completion of the plant. Now
when this was going on the by-pass was of course used
107 by which the raw sewage was conducted from the distributing manhole to the manhole on the left side of the blue print on page 2 and thence into Town Creek. Otherwise the sewage would have backed up in the lines and have caused the citizens inconvenience. This sometimes happens in the construction of a new plant. It is an emergency occasion but is not to be expected afterward. I have visited the plant from time to time since then and found that on some occasions it was not receiving all of the attention it should and on other occasions that it was receiving proper attention. There was practically no odor along the outlet on some of my inspection trips to the Town Branch through Mr. Dickey's pasture. While in other cases there was. When the plant is in operation the effluent discharged therefrom carries some finely divided particles about the size of a pin head. In my many inspections of the tank I have never seen anything larger than that passing out in the effluent.

On one occasion at my request Mr. Johnson, the State Health Engineer, met me at the plant and we went over together, and we detected an odor when we were walking along the creek, but thirty to forty feet away we were unable to get

any odor. This was walking along the creek on Mr. Dickey's land below the outlet, probably 150 to 250 yards below the outlet.

This stream is a typical town branch. It carried the surface drainage from every freshet, and a number of residences located further up in town having outside toilets and located as close to it as they can be, and naturally they get some drainage in times of freshets, and it is the depository of a lot of tin cans and buckets and all sorts of rubbish and trash, and I never saw it when it was anything else but unsightly, either before the construction of this sewerage system or since. The stream above the outlet is clogged in various places with old vegetation, decayed leaves and twigs and things of that kind. In some places the weeds are grown up in it across the bottom so that they would naturally clog slow flows and catch floating particles, and in other places there is brush that has been thrown into it so that it would catch anything of that sort, and at no time during any of my observations was it a clean, clear flowing stream. I have seen stagnant places along
the stream in low water periods where it was pretty
108 well covered with scum and bubbles coming to the surface, indicating decayed matter, gases coming to the surface. I am speaking now of the creek above the sewer outlet. Occasionally there is an odor above the creek. Nearly all Imhoff tanks have a slight odor and the odor may be worse, at one time than another, depending upon the operating conditions. I know of the slaughter house along this creek and have been along there when it was being used or after it had been used and the discharge from that slaughter house entered this Town Creek above the sewer outlet, but I don't know whether the slaughter house is active at present.

Cross-Examination

I am not sure that I can locate on the blue print exactly the old septic tank. I have been to it many a time and it is still there so far as I know. It was up here in the north part of the second ward. It came down a little draw leading off of Town Creek. The circle I have put on this map, Exhibit B, indicates the approximate location. The sewer from the Court House ran into the old septic tank. It was for the purpose of serving the Court House and the hotel and the uptown district, the square and other places off the square. The

septic tank discharged at the top and the discharge from it entered Town Creek somewhere above Moudy Pond, which is about half a mile above the Dickey land. Town Creek is a slow, sluggish creek.

At the time we began our work we found 100 private sewer systems in the town. They were not all connected with this septic tank. It drained I would estimate 50. I did not count the connections, but I would say probably 40 or 50.

The map, Exhibit B, indicates that Town Creek flows into a pond just below the old septic tank.

"Q. So that all of that sewage would pass through that body of water?

A. If that body of water is there all the time. A pond is there today and gone tomorrow sometimes.

Q. Well, it was there in 1923?

A. It was there part of the time.

Q. Well, what part of the time?

A. It was there when we made the map."

109 "Q. Yes, and a body of water of that kind will tend to purify sewage, will it not? A. No, sir, not a pond.

Q. Not a pond? A. No, sir.

Q. Why not?

A. Because it takes a running stream where you have some ripples. Pond water is the most stagnant water there is.

Q. Would there be oxygen in that pond water?

A. Sure.

Q. Well, does oxygen purify sewage?

A. Yes, that is practically the only thing that does.

Q. I see. Well, then, if you put sewage in a pond where there is oxygen, would there be some purification go on?

A. I never heard of anybody putting sewage in a pond. I don't know.

Q. Well, sewage went into this pond, didn't it?

A. Probably a good deal of it stuck along the edge if it did.

Q. And would be held there and wouldn't flow on down to Mr. Dickey's land, would it?

A. Chances are a good deal of it lodged there."

110 The old septic tank was close to some negro shacks.

One reason the City wanted to build a sewer plant was because of the complaint against the septic tank. Also because that system only served a small portion of the town and did not give a very satisfactory reduction of the solids. It wasn't an approved type of tank. Also, the City wanted a comprehensive system for the entire town.

"Q. Well, you covered the whole town with the new system, did you not? A. Yes, sir.

Q. And this old system just covered a little portion there leading down from the square?

A. That is correct, but the city did not have any water works until 1929, so they didn't use that system."

Yes, the City formerly took its water supply from Lake Luna, when it was served by a private plant back in 1923. The water from Lake Luna overflows into Town Creek. No, sir, that Lake Luna water was not pure water. The city did not drink it—it was a town cow pasture and all the town cows were pastured around that lake. It was a private water supply and nobody in Harrisonville used it to drink or hardly to bathe in. It was a water you could hardly wash your face in because it smelled to high heaven. By a private plant I mean it was owned by a private corporation. The water was used to put out fires and sprinkle lawns. The City had no water works, but we just got through building one last year. I never was around the lake itself and can't tell about the odor there, but I do know there was plenty of odor from the water that came from it. I used it in the hotel. It was used to flush the toilets. It was piped to the square and all over town. It was not used for domestic purposes. I don't know but I wouldn't wonder if the horses drank it, but the people didn't. No, sir, I made no laboratory tests of Town Creek in 1923. My statement that it was polluted at that time is based upon twenty or thirty years experience and observation of other similar creeks and pools and seeing the results of samples, tests made of other similar streams.

The plant we built might have been of different design but that particular one seemed to suit the conditions there and the amount came within the limits which the officials felt would be wise to try to carry. A more elaborate plant might
111 have been built had the City's bonding limit permitted. I built the best plant I could with the money I had to work with. This is only a primary sewage disposal plant and has no secondary feature whatever. It reduces sewage about sixty per cent and the effluent from the plant is putrescible.

Whether that effluent will create a nuisance in a small body of water depends entirely upon the amount of solids and the care taken of the plant and the amount of water flowing in the stream into which the effluent flows. It may or may not be septic. A process of oxidation goes on from the time it

leaves the plant until it is completely oxidized. That process creates grayish deposits, sometimes dark. Plaintiff's Exhibit 5 contains typical samples of such grayish deposits.

No, sir, it is not possible to completely reduce sewage. Nobody ever said that. A secondary plant will produce an effluent which will remain stable, so that a small body of water will carry it off without septic action, provided the plant is properly designed, constructed and attended. I have designed several such plants and their operation has been successful. The effluent from the Unionville plant flowed into a stream about the same size as Town Creek. I have examined the water of that stream, but it is not altogether clear, slightly clouded sometimes. I have never observed any deposits of sewage made in that creek.

There was an alleged nuisance at Unionville which was made the basis of a suit by property owners with the result of a judgment for the city, the Court finding that there was no nuisance in the creek.

"Q. Now, you said that this Imhoff tank was designed sufficient to take care of population for which designed? Now for how many persons did you design that tank?

A. About fourteen or fifteen hundred.

Q. And what was the population of Harrisonville in 1923?

A. The population in Harrisonville is about two thousand, has been that for years and years; only fifty or sixty per cent of a town of that size is ever sewered.

Q. Now, do you recall what the capacity of the settling compartment is? A. 1965 cubic feet.

112 Q. And isn't it true that that is the capacity for only 995 people? A. No, sir, it is not true.

Q. How do you determine that that capacity is sufficient for 1500 people?

A. The State Board of Health rules at that time called for one cubic foot of sludge capacity per population to be served and we designed this for one and a half, making a fifty per cent increase over their requirements.

Q. Well, did you yourself consider that sufficient?

A. That was fifty per cent greater than the State Board of Health was requiring at that time.

Q. That isn't what I am asking. I am asking if you yourself considered it sufficient?

A. A foot and a half per unit?

Q. Yes.

A. I did; I didn't pretend to go over the State Board of Health.

Q. You mean you were governed entirely by the standards that the State Board set?

A. Not entirely, but I felt that it was not wise for me to place my judgment over theirs.

Q. What do you mean "not wise"?

A. Well, I assumed that their minute study of the matter gave them perhaps as much or more information on the subject than I would have."

We designed the plant for 100,000 gallons per day flow. I don't remember offhand on our check what the number of houses in Harrisonville was. I would judge it was around 500. No, sir, I didn't say there were 50 houses in Harrisonville on the old line that went to the septic tank. I said 50 services. The plant as designed was adequate I think for the City of Harrisonville. In any city of that size all over this state and any other state there is at least one-third of the population that cannot be sewered because the houses cannot be made modern, very cheap type, have no basements, no way of making them modern. Harrisonville is not any exception to the rule. About one-sixth of the possible services of the City of Harrisonville went into the old septic tank. It is impracticable that every house in Harrisonville would connect with this present sewage system. It is never done in any town, not even in Kansas City, Missouri, although the city makes an effort to get that done. The connection of the whole city with the city sewage system is an ideal condition never realized. It might be done if a person were developing a city like R. A. Long is at Longview, have every house sewer connected.

113 "Q. I see. Now, Mr. Rollins, when a city has no sewage system and uses private disposal plants, the seepage is slow, is it not? A. The seepage from what?

Q. From the private sewage plants connected with dwellings?

A. Depends on the general contour of the town, whether it is slow or fast. If it has extremely steep hills, every time there is a freshet, surface drainage is washed into the natural drainage course.

Q. Yes, and when there is a freshet there is a greater volume of water to dilute the sewers, is there not?

A. Should be to a certain extent, yes.

Q. And therefore the pollution is accordingly reduced?

A. For the time being.

Q. And when the time is dry, then there is no wash and there is a gradual seepage through the soil, is there not?

A. A seepage or surface drainage. A good many of these little septic tanks have a surface outlet and they run along the drains and gutters.

Q. And there is a purifying action in progress during that period of seepage?

A. A certain amount of oxidation takes place, yes.

Q. Now, assuming that there are 500 houses in the City of Harrisonville and that there were fifty connections to this old plant and that the present plant now has a capacity for 100,000 gallons a day, and that of that 100,000 gallons at least forty per cent must necessarily go into Town Creek in a septic state, wouldn't you say that there must necessarily be more sewage going into Town Creek now than there was before the present plant was built?

A. Please repeat that question. You had so many questions, I don't quite understand.

Q. Of course, in order to examine an expert, I have to ask a question which involves all the factors, but I will ask it again.

(The preceding question was read.)

A. I do not assume that forty per cent is going in in a septic state.

Q. You said yesterday that an Imhoff tank had a max-
114 imum capacity to reduce sixty per cent of the sewage that goes through it.

A. Sixty per cent of the putrescible matter.

Q. Yes. Now that means that at least forty per cent of the putrescible matter goes through the tank untreated, does it not?

A. No, I wouldn't say untreated. It is all treated, all that goes through the tank is treated, but forty per cent of the putrescible matter is still held in solution in the sewage.

Q. And that forty per cent of dissolved solids is putrescible, is it not? A. Yes.

Q. And it remains septic?

A. Remains septic probably when it leaves the tank, but not necessarily septic for a long period.

Q. Well, that is not what I am asking. I am asking if forty per cent of the total sewage that goes through the tank doesn't come out of the tank in a putrescible condition?

A. Your question is a little ambiguous.

Q. Well, tell me how it is ambiguous.

(The preceding question was read.)

A. All of the sewage that goes in the plant comes out except the solid matter.

The Court: The question is does it come out in such a way that putrefaction is going on when it comes out?

A. The Imhoff tanks properly operated take care of sixty per cent of the putrescible matter.

Q. Yes; now, isn't it a necessary complement of that statement that forty per cent comes out of the tank putrescible?

A. Forty per cent of the solid matter is still held in suspension.

Q. Well, is it putrescible? A. Yes.

Q. It is. Now, that would be 40,000 gallons a day that might possibly come out of the Imhoff tank putrescible?

A. When the city is thoroughly connected up.

Q. Yes. Now, what I asked you a few minutes ago was this: If that 40,000 gallons of putrescible sewage matter flowing out of the Imhoff tank into Town Creek is not more sewage than flowed through the old Cameron septic tank?

115 A. It may be a larger volume.

Q. Larger volume?

A. That is mere guess work on my part or yours either.

Q. Well, what is your opinion?

A. My opinion is that the uptown district, which was served by the old Cameron tank carried a much larger volume of sewage per connection than the city at large will carry for the reason that it served the uptown section. It had public toilets in the Court House and the public used those toilets. The public used the hotels.

Q. Now, you said there were about forty or fifty connections up there?

A. Yes; public connections get more sewage than a private house connection, a great deal.

Q. Yes, and you say there are 500 houses in the City?

A. But there is quite a lot of difference between one connection and another.

Q. I understand, but the old tank cared for about ten per cent of the connections which are possible under the present plant?

A. I don't think there will ever be over 350 connections. That is my estimate.

Q. Well, 500 are possible, aren't they?

A. Theoretically, yes; practically, no.

Q. You don't know how many there are today, do you?

A. I know how many there were recently, 275.

Q. Well, now, you wouldn't say that the old septic tank cared for more sewage than the present Imhoff tank ejects into Town Creek, will you?

A. I wouldn't say it did because I don't know.

The effect of closing the valve on one of the settling chambers would be to shorten the period of retention of the sewage through this tank. That was recommended by the State Board of Health after the plant was installed. In the other chamber you would have simply the water from which the solids had settled out in the sludge basin. The gas vent which you show me in the picture of the tank looks as if it had been slightly neglected. Of course whenever the sludge in
116 the settling chamber reaches the point about 18 inches below the sloping walls of the center compartment, gas arising therefrom would come up through the two outside chambers, the settling chambers, but the sludge at that time is supposed to be removed from the tank. The line to which you point in the pictures might indicate gas or one of a number of other things.

No, sir, we did not seal the by-pass after we were through with the construction. We never do. I know the State of Kansas does permit a by-pass, because we have built a lot of such plants.

117 They do not have to be sealed because I have been with the engineers and made final inspections and they were not sealed. The one we last finished was at Kiowa. I do not recall any others. Of course, this by-pass has a valve which is kept closed, but which can be opened by the operator in which event raw sewage will go around the tank. Oh, yes, we could have disposed of drainage during the construction period by having a pit there and putting in a pump and pumping it as fast as it accumulated. To have handled it by natural flow through a trench would have required a pretty deep trench. It could have been done but the trench wouldn't have stood up. It would have had to have been braced.

Q. Well, you just needed it during construction days, didn't you?

A. Oh, no, you may need a by-pass any time.

Q. For what purpose?

A. For working on the disposal plant.

Q. And for the purpose of passing the raw sewage and all of it around the plant?

A. If you need to do that, the by-pass could be used for that purpose.

Q. Well, now, so far as construction itself was concerned, you didn't absolutely need a by-pass, did you?

A. It was the least expensive way of handling it, good construction to put it in.

Q. Well, you have in mind naturally, since you are going to have one ultimately, you will use it for construction purposes, too, but for construction purposes alone, no by-pass is necessary, is it?

A. Not absolutely.

Q. Now, Mr. Rollins, you stated yesterday that the water in Town Creek above the Imhoff tank outlet is polluted, but you stated that you had not made any tests and I understand that you gave that opinion on observation?

A. My personal opinion was based [—] observation only.

Q. Would you stake your professional reputation on that opinion? A. I am not a chemist.

Q. You are not a chemist? A. No, sir.

Q. You wouldn't give a professional opinion that that water in Town Creek above the Imhoff tank outlet is polluted, would you?

A. Well, I have seen the results of some tests that were made on it and the tests indicate it.

118 Q. Well, I am speaking of your own personal professional opinion?

A. What was your question?

Q. I am asking you if you would give your own professional opinion that the water in Town Creek above the Imhoff tank outlet is polluted?

Judge Glenn: Your Honor, I think that is unfair to the witness. The witness is under oath, and as to his professional reputation and substantiating his oath, I do not think it is fair.

The Court: I understood the witness to say that on his own observation the water was polluted.

Mr. Hazard: Yes. Now I am trying to test that.

The Court: Of that that is, whatever judgment he has, you have got that opinion from the witness.

By Mr. Hazard:

Q. Would you give an opinion from observation that water is not polluted?

A. I based the statement that I made on a comparison of other similar streams.

Q. Well, that is not my question. I asked you if you would give an opinion from observation that water is not polluted?

A. Most branch water is polluted.

Q. Mr. Rollins, we would get along a lot faster if you would answer my question. Now, you know what it is.

A. I said most branch water is polluted.

The Court: The question is, Mr. Rollins, from observing any stream, whether you would be able to say whether it is polluted or not?

A. Not in every case because some clear water will contain pollution; water that may look perfectly pure may contain harmful bacteria and be harmful both to stock and to persons, might be perfectly clear.

Q. Isn't it a fact, Mr. Rollins, that you can't determine whether water is good or bad by looking at it?

A. You can't tell what harmful bacteria it may contain by looking at it, no.

Q. And you can't tell by looking at water whether it is fit to drink, can you?

A. Well, that is just what I said. You can't tell.

119 Q. Now, did you ever see raw sewage going through the by-pass? A. No, sir.

Q. How many times have you inspected that plant since you built it?

A. Oh, I have perhaps been there a dozen times since the plant was completed.

Q. When was the last time you were there?

A. I believe the last time I was there was about a year ago in April, something like that, about April or May, 1929.

Q. You haven't been there in the last year?

A. In Harrisonville a good many times, but I didn't make an inspection of the disposal plant.

Q. Now, you said yesterday that oxidation was about the only method of disposing of sewage. What other method is there? A. You mean to hasten oxidation of sewage?

Q. Well, yes, to reduce sewage to a stable condition.

A. Well, it could be chlorinated; that aids.

Q. Can be what? A. The effluent can be chlorinated.

Q. What is the chemical process that goes on with chlorination of sewage?

A. Well, the chlorine is simply applied to either the raw sewage or the settled sewage.

Q. What other methods are there then?

A. Well, sewage may be filtered by sprinkling or by contact filters. That hastens oxidation, aids oxidation.

Q. Well, then, that is an oxidation method?

A. Certainly.

Q. The chlorine simply breaks down the sewage and hastens the oxidation, doesn't it?

A. That is what I understand. I am not a chemist, I don't know the exact reaction that takes place.

Q. Now, what other method is there for reducing sewage?
A. Well, there is activated sludge processes, that is an oxidation process.
Q. Are you familiar with the fish pond method?
A. No, sir, never used it.
Q. Do you know about it?
A. Don't know anything about it.
Q. Don't you know that it was the great method in Europe and Germany for years?
A. I think I have read somewhat about it, but never
120 read the way it is used, or with a view of using it.
Q. What are the two stages in the reduction of sewage?
A. Well, one is what is called reducing the amitosis and the other, the mitosis.
Q. Well, now, what action goes on in the first stage?
A. Well, when the first stage is performed, in the absence of air and light certain bacteria perform certain functions; the second functions are performed with the aid of air and light. Those are the two stages.
Q. Those are the two stages, are they?
A. Those are the two stages for reducing the bacteria.
Q. And the first one has to go on, you say, in the absence—
A. (Interrupting) In the absence of air and light, and the second one with the aid of air and light.
Q. Well, now, Mr. Rollins, isn't it a fact that the first stage is called fermentation?
A. That is just another name for the action of the amitosis.
Q. Just another name for it?
A. That is what the amitotic stage is, fermentation stage.
Q. Now, assuming that you are right, what substances are treated or disposed of in that first stage?
A. Well, I don't know that I can say just what substances are disposed of.
Q. Don't you know that in the fermentation stage the carbonaceous matter is oxidized?
A. I know it is an oxidation process.
Q. I know, but I am speaking now of some subdivisions of the treatment of sewage. Do you know that in that first fermentation stage the carbonaceous matter is oxidized?
A. I stated a while ago I wasn't a chemist.
Q. Don't you have to know something about these things in order to treat sewage?
A. Yes, sir, you have to know a great deal about them. You don't have to be a chemist, though.

Q. Well, don't you have to know something about the chemistry of sewage disposal?

A. Yes, you have to know something about it.

Q. But you don't know that the carbonaceous matter is oxidized?

121 A. I think I have read that twenty-five or thirty years ago when I was in school. I don't know that I could have recalled it unless you had refreshed my memory.

Q. And you haven't had occasion to use that?

A. I think I read it a long time ago.

Q. Didn't you say you had put in more sewage plants than anyone except one engineer in the State of Missouri?

A. No, sir, I did not.

Q. How many have you built in the State of Missouri?

A. I said we had built more municipal plants.

Q. How many sewage plants?

A. But not so many sewage plants. I think we have built as many sewage plants as anyone else.

Q. Don't you know that the second stage is the putrefaction stage? A. I think that is correct.

Q. And do you know what substances are disposed of in the second stage?

A. No, you would have to refresh my memory again.

Q. You don't remember that the nitrogenous organic matter is disposed of by oxidation in the second stage?

A. That is immaterial to me.

Q. Now, do you know which one of these stages goes on in an Imhoff tank? A. The fermentation stage.

Q. How is that?

A. The solids are settled out in the Imhoff tank.

Q. Oh, yes; that is mechanical, isn't it? You could do that with screens or any other of several methods?

A. Oh, no.

Q. Well, now, what is the chemical process? Which of these two stages goes on in the Imhoff tank?

A. The solids are settled out, digested in the sludge chamber, and later removed.

Q. Now, I am speaking of whether it is fermentation or putrefaction that goes on in the Imhoff tank.

A. Well, it is putrefaction.

Q. Well, has the fermentation already occurred?

A. Why, it might in some cases occur before the sewage reaches the plant.

122 Q. Well, would there be any fermentation in the Imhoff tank at all?

A. Septic action would take place anywhere along the trunk line or in the plant.

Q. Now, is septic action fermentation or putrefaction?
A. Septic action is fermentation.
Q. And it is not putrefaction?
A. Well, it may be a little of both.
Q. Do you know what gases are given off in the fermentation stage? A. No.
Q. How about hydrogen sulphide?
A. Always present in sewage.
Q. How about carbon dioxide?
A. I think that is another one.
Q. Ammonia? A. In most sewage.
Q. In most sewage?
A. Most sewage contains a certain amount of ammonia.
Q. Well, I am speaking now of the fermentation stage. Do you know whether there is any ammonia gas given off in that stage?
A. All gases are given off in the fermentation stage.
Q. All gases?
A. A percentage of them in the fermentation stage.
Q. You mean all the gases there are?
A. No, I don't know that all of them, but most of them.
Q. How about methane?
A. Well, I couldn't tell you about that. I am not a chemist.
Q. Well, do you realize that all of these things are involved in the disposal of sewage, don't you?
A. They may be; not particularly in the design of a sewage disposal plant, though.
Q. Now, you spoke of this amitotic action. You say that occurs in the absence of light? A. That is what I said.
Q. Does oxygen have anything to do with that?
A. Yes.
Q. What does it have to do with it?
A. Oxygen is combined with the matter in the sewage to help break it down.
Q. No, there is an oxidizing effect going on in the plant which helps to reduce the putrescible matter.

Q. Why, Mr. Rollins, don't you know that the amitotic action is the action of bacteria in the absence of dissolved oxygen?
123

A. There is always oxygen in water.
Q. In water, yes, but how about in sewage?
A. All sewage is ninety-five per cent water.
Q. Well, now, Mr. Rollins, you made some tests in this creek below the Imhoff tank outlet and you found there wasn't any dissolved oxygen in there at all. Would you say those tests were wrong?

Mr. Barnett: Of course you misspoke yourself when you said Mr. Rollins made these tests.

By Mr. Hazard:

Q. I meant to say they made some tests. There were some tests in evidence. You were in the court room. You heard the testimony of Mr. Black in which he said there was no dissolved oxygen in the creek below the outlet?

A. The dissolved oxygen had been used up in oxidizing the sewage that was carried into the water.

Q. But you said a minute ago that there was always oxygen.

A. Well, that is dissolved oxygen, that is free oxygen, surface oxygen.

Q. How is that?

A. Oxygen that may still be used for oxidizing purposes on sewage or any other foreign matter.

Q. Well, is dissolved oxygen anything except oxygen in water?

Mr. Barnett: It seems to me there is a good deal of repetition about this, taking a good deal of time on one witness.

The Court: Can't you have a chemist tell you about these things? This man says he is not a chemist. A chemist can tell us all about these things.

Mr. Hazard: Very well."

124 This location was selected for the tank because it appeared in our studies to be the most feasible location, counting gravity of flow of the sewage for the greater portion of the town, the necessary cuts, the elimination of a line station for public sewage and other features that had to do with the design. It was a convenient place to enter the creek. The ground was available, we could purchase it without going into a law suit to get it and the creek made a bend there that brought it over close to the right-of-way.

Cross-Examination

By Mr. Donaldson:

In 1923 I was acting as engineer for the City of Harrisonville in the design and construction of the plant and as such engineer selected the location of the outlet and made demand upon the Missouri Pacific for the purpose of crossing their right of way at the order of the city officials. The Missouri Pacific Railroad Company did nothing whatever

125 in the construction, or since in the operation or maintenance of the tank.

Redirect Examination

All of the sewer system we designed that passes through the Imhoff tank lies within the natural water shed of Town Creek and this sewer system is required for the purposes of the general health and public sanitation of the City of Harrisonville.

Even with secondary treatment supplementary to the Imhoff tank it is not likely that the effluent would be entirely free of putrescible matter. The secondary treatment ordinarily removes twenty to thirty or thirty-five per cent of the putrescible matter. In some extreme cases, some ideal cases, it might remove it all, but in most cases about ninety per cent would be the total of the putrescible matter removed by the combined action of the Imhoff tank and secondary treatment. I never saw the effluent collected in the trough after flowing over the weir at the end of the Imhoff tank of any such dark color as shown in Exhibits 5 and 6. It is clear with a slightly grayish tinge to it. Placed in a bottle it is almost transparent.

At the plant there is usually a slight odor. The distance from the plant at which you get the odor depends upon the direction of the wind and the state of the atmosphere as to whether these odors may arise. If there happens to be humidity in the atmosphere so that the odors do not rise, and as the wind carried it in some certain direction, you may detect it a hundred yards away. In other cases, you might be within twenty-five feet of it before you could detect any odor. The Imhoff tank is entirely open with no cover over the top. All secondary treatments that I have observed increase the odors emanating from the plant over those that do emanate from merely primary treatment. In the secondary treatment the sewage is in liquid form and in a sprinkle, and naturally the sewage in fine particles is more exposed to the air and the oxidizing effect than in falling on the broken stone and which of course is filled with air prior to the dosing of the sewage. This oxidation period is one of the sources from which noxious odors arise. There may also be some during the primary settling periods. If any secondary process were added to this Imhoff tank it would increase the disagreeable odors given off by the plant. Defendant's Exhibit C is the document which I received as engineer for
126 the City of Harrisonville from the State Board of Health of Missouri at the time of undertaking the construction of this sewer system.

Defendant's Exhibit "C"

"State Board of Health of Missouri, Division on Sanitary Engineering.

Report on Sewerage Conditions in Harrisonville, January 5, 1923.

Harrisonville is the County Seat of Cass County, having a population of 2073 (1920) census). It covers an area of about one and one-third square miles, about one-third of which is built upon. The topography is rolling with a portion of the town built on the crest of a low ridge.

A field investigation of sewerage conditions in Harrisonville was undertaken on request of City authorities. It was found that there were over one hundred private sewerage systems in operation in the city serving residences and private houses. The balance of its homes are served by privies.

The field survey showed that the city of Harrisonville should immediately undertake the construction of a municipal sewerage system.

A municipal system of sanitary sewers is much more economical and satisfactory than the further general installation of private system of sewage disposal by the residents. The experience of hundreds of towns of one to three thousand population has proven this. They have found it desirable from an economic standpoint to install a municipal sewerage system even though a great many private systems already existed. The immediate installation of a municipal system will save the investment of additional money in constructing new private systems and improving old ones. Any such investment would be largely wasted when a municipal system is installed, as eventually is always done.

Not only is the cost per individual for a private sewerage system considerably greater than the proportionate cost for a municipal system, but also the expense of maintenance and operation is greater. A municipal sewerage disposal plant can be cared for at a small fraction of the amount which is, or should be, spent to insure the sanitary operation of private systems of sewage disposal.

Added to these economic arguments, an even more important consideration is the positive benefit to public health which will result from the installation of a municipal sewerage system in Harrisonville. Data accumulated from inspections and various sources reveals the surprising fact that

all but a few of the private sewerage systems are so installed and operated that they are a menace to the health of the community. This is due to the fact that most of the cesspools overflow at times, and that in other cases the sewage or septic fluid is discharged openly upon the surface of the ground. These practises are a violation of the regulations of the State Board of Health, adopted to protect the people against the transmission of communicable diseases.

It should be understood that even the clear effluent of a septic tank is likely to contain disease germs, since it has been found, for example, that typhoid bacteria will live in septic fluid for a period of ten days. The discharge of either the septic fluid or raw sewage upon the ground surface consequently constitutes a real menace to health. Flies serve as agents for the transmission of disease germs from the point of discharge to food in stores and homes. Domestic animals serve to carry these discharges to persons fondling them, and it is often found that children come in direct contact with the discharges when playing near such outlets. Many epidemics of filth borne diseases have occurred as a result of the existence of just such insanitary conditions.

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One solution to these insanitary conditions would be the improvement of all private sewerage systems so that no sewage or septic fluid was discharged upon the surface of the ground. This would be extremely difficult in many instances and would mean greatly increasing the investment in private systems which money would be largely wasted when the municipal sewerage system is installed. The discharge or overflowing of sewage or septic fluid upon the ground within the city constitutes a nuisance, since as pointed out, it is a positive menace to health. Authorities can order these nuisances abated, and if these orders are not carried out by the owner, may have them abated at the owner's expense. In case a municipal sewerage system is not designed, such action would certainly be appropriate and desirable in view of the menace involved and the numbers of complaints received regarding these nuisances.

However, the only permanent and economical method of remedying these conditions is the construction of a municipal sewerage system.

Summary.

The field survey showed that the existing sewerage conditions in Harrisonville were very unsatisfactory from a sani-

tary point of view, due to the fact that most of the cesspools overflow at times and that sewage and septic fluid is discharged opening on the ground surface in a large number of instances, thus endangering the public health. The construction of a municipal sewerage system to permit the elimination of these insanitary conditions is strongly recommended.

GEORGE W. PUTNAM,
State Sanitary Engineer.

Approved
Cortex F. Enloe, M. D.
State Health Commissioner."

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128 Recross Examination

The black substance in the bottom of Exhibit 5 looks to me like decayed vegetable matter, but this is based upon appearance only and I can't say what it is. I can't tell you whether a similar substance is found in the bottom of a septic tank or not. Yes, sir, our plant at Unionville is operating satisfactorily, but I wouldn't say that all of the putrescible matter was out. The effluent from that plant produces a slight odor in the stream. There have been odors there when I have seen it. It is possible there may not have been any at the time that Mr. Johnson saw it. If Harrisonville had a secondary treatment the condition in the stream would be improved and the pollution and noxious odors would not be sufficient to be objectionable.

When I saw the stream last, about a year ago, there was pollution both above and below the outlet that appeared to be septic. The water above the sewer outlet was running in a good deal smaller quantity because the effluent from the tank probably constituted a considerable percentage of the total flow below the outlet. Below there were evidences of cattle standing in the stream where there were none above. When cattle stand in streams the water becomes somewhat polluted. These banks were full of tracks of cattle, where they were in these pools, that crossed the banks back and forth. This was below the outlet. There was more evidences below the outlet of the grayish stringy matter appearing in plaintiff's Exhibit 5.

I do not say that there is a 100,000 gallons a day going into this stream from the Imhoff tank. That is the capacity of the tank when the city is fully connected up, its ultimate capacity. From my observation the stream is polluted both above and below the outlet with a larger percentage of pollu-

tion below. But at the time I observed it there didn't seem to be sufficient pollution to be objectionable. I have seen a number of other streams which indicated as much pollution where no objection was ever raised. I do not consider the pollution above this outlet objectionable for the use of cattle, nor below the outlet either. The cattle were using the water of the stream below. I never have seen the stream when there was any large difference above and below the
129 outlet. I have seen the disposal plant some ten or twelve times altogether. I wouldn't be positive that I have gone to the creek that many times. I observed the disposal plant that many times and I usually step over to the creek, over to the Town Branch, go down the branch for a hundred yards or so and take a look at it. Yes, sir, I have seen the creek more than five times.

C. V. Lynch.

C. V. Lynch, called as a witness on behalf of the defendant, City of Harrisonville, testified as follows:

Direct Examination

I am City Clerk of the City of Harrisonville and have charge of the records of that city's funds and assessments and tax books, and I have with me a statement compiled of those different funds. This was compiled by the requirement of an ordinance of the City of Harrisonville. The last one was made June 2nd.

"Mr. Hazard: (Counsel for plaintiff): If your Honor please, we object to this evidence as not a proper matter of defense. There are several methods by which the City may build a sewage system or a disposal plant. It is not confined to its power to borrow money.

The Court: Let's get at the point here. Are you trying to show the city of Harrisonville is poor?

Mr. Barnett: Yes, sir, not only poor but that it may not, within the limits of the law, by the sale of additional bonds get the money to build this secondary plant. Our purpose in this testimony is to show the Court what the financial condition is of the City. Of course, whether or not the City can or cannot create greater indebtedness after that is a question of law, regulated by the Constitution and the statutes, but this is to give the Court the facts about our present financial condition.

The Court: Now, is it your statement that the City could encroach unreasonably upon the land of a property owner

and then defend its conduct, justify it, upon the ground that it was not financially able to do a reasonable thing?

Judge Glenn: No, your Honor, it is not.

The Court: In other words, that a poor town could do an unreasonable thing and a rich town could not.

Judge Glenn: We do not take that position, but
130 this: If it is possible for this Court to make an order for us to put an additional plant in there, this Court would have to take into consideration the fact that—whether we have exceeded our constitutional limit of indebtedness before the Court could force us to do it; in other words, if the Court could force us to do something the Constitution said we couldn't. But as to the damage we have done, the party can sue us and get a judgment and the Court can cause a levy in addition to a constitutional limit, but the City can't vote a bonded indebtedness.

The Court: I understand the theory that you can pay damages, but you can't arrange to prevent damages, is that it?

Judge Glenn: This other way, we would have to vote bonds to do this, and we have exceeded our constitutional limit,—that is, we haven't exceeded it, but we have already bonded the City to the maximum.

The Witness: Section 12 gives five per cent for building sewers. We have now under that five per cent some $42,-500.00.

The Court: Now, for the purpose of this case, couldn't there be an agreement entered into so as to avoid all of this testimony, subject to your objection, as to what the value of the City is, what its assets amount to, and that it has reached the maximum of its bonded indebtedness, all subject to your objection, that is material here, so we can have it, and it will cut out a great deal of testimony.

Mr. Winger: I didn't quite get the Court's suggestion.

The Court: Couldn't it be agreed that that is the fact, that the City has reached the limit of its bonded indebtedness, subject to the objection, to the end that that matter might be submitted?

Mr. Winger: We do not think it makes any difference, but if it is a fact there is no use putting in a lot of time proving it. If these gentlemen say to me, as brother lawyers, it is a fact, I see no necessity of taking a lot of time of the

Court to prove it, and it might be admitted that the bonded indebtedness limit has been reached, but we object to that as an immaterial matter.

Mr. Barnett: I do not want to be misunderstood in
131 that matter, and I am sure co-counsel doesn't either. We believe this involves a question of law, and we believe that, under the Constitution and the Statutes, we have reached the limit of our bonded indebtedness so far as the construction of any additional sewerage plant is concerned, but I do not want these gentlemen to come to me and say "We have investigated the law and we have a different view about the thing". We are giving them our opinion as lawyers about it, and let me say this, if the Court please: These gentlemen say that we can build an additional system there and both for the purpose of measuring the City's power to issue additional bonds for that purpose, and also for the purpose of informing the Court about our financial condition,—those are all things which the Court would naturally take into consideration in that matter; of course we do not concede that there is any jurisdiction in the Court to make an order of that character, but that since these gentlemen have presented that issue, should the Court, in the outcome of the case, believe with them that there is such jurisdiction, then the Court should have this additional information to know whether or not it can be done by the City lawfully.

The Court: Make your objections on the ground it is immaterial, and let's go on with this case.

Mr. Hazard: We object to this evidence on the ground it is irrelevant and immaterial for the reason that the City, under the Laws of 1929, Page 319, has the power to build a sewage disposal plant by general contract, payable out of its general revenues over a ten year period without resort to its bonding power; that the City also has power, under the statutes, to build a sewage disposal plant by a special assessment without resort to its bonding power.

The Court: Now, then, subject to the objection, I will admit this testimony. Then I can look into it. You may proceed. I am not going to rule on the objection. I will admit the testimony and rule on the objection later."

The Witness continuing: I have the assessed valuation of
the City of Harrisonville made on June 1, 1927, to-wit:
132 $1,101,672.00. The valuation made on June 1, 1928 is $1,224,118.00 The 1929 assessment has not been ap-

proved by the Board of Equalization of the State of Missouri and I know nothing about it, and it hasn't been certified to me by the County Clerk.

The bonded indebtedness of the City of Harrisonville at the present time is,

Sewer bonds	—	$39,000.00
Water works bonds	—	100,000.00
Other bonds outstanding against the current revenue	—	3,500.00

The other liabilities of the city will amount to on

Water works construction	—	$3,066.44
Accounts payable	—	11,258.59
May salaries that have not been paid	—	881.40
Accrued interest on water bonds	—	1,687.50
Accrued interest on sewer bonds	—	681.66

That is all except the overdraft on the light general and water general. The overdraft on the light general fund is $2,378.56, and the water general fund $458.42.

To pay this indebtedness the city has in view delinquent

Real estate taxes	—	$2,948.64
Delinquent personal taxes	—	2,319.47
Delinquent oiling taxes	—	1,475.99
Delinquent merchants' taxes	—	353.44
Total		$8,097.54

From experience I would say that the City will not collect over 50% of the delinquent taxes, that is a liberal estimate. On hand the City has the following amount:

General fund	—	$358.77
Fire equipment fund	—	425.23
Sewer fund	—	4,897.33
Water works bond fund	—	2,466.17
Electric light guarantee fund	—	75.00
Water guarantee fund	—	382.50

The sewer fund and water works bond fund, will be practically dissipated on July 15th and August 1st, to take up the interest due at that time. The electric light general fund, according to the treasurer's report, had $1,362.71, and the water general fund was overdrawn $21.72, leaving a balance out of these funds of $9,945.99. The report in question, defendant's Exhibit "D", was then offered in evidence by defendant and received by the Court subject to the objection last made by the plaintiff.

133 Defendant's Exhibit "D"

1928
valuations of taxable property in Harrisonville, Mo.

Real Estate	$ 790,390.00	
Personal & Merchants	311,282.00	
Total		$1,101,672.00
1929 Valuations.		
Real Estate	$ 891,880.00	
Personal & Merchants	332,238.00	
Total		$1,224,118.00
		2,325,790.00

Minutes of the Board of Aldermen, Oct. 5th, 1923 show report of the consulting Engineers, recommending acceptance and final payment due contractors for construction of the sewer system in Harrisonville.

Financial Statement # 62 of The City of Harrisonville, Mo., as of June 2nd, 1930.

Assets.

Real Estate			$ 3,286.00
Fire & street Equipment			8,663.32
Light plant			24,997.70
Water plant			111,266.97
Delinquent Real estate taxes		$ 2,948.64	
Delinquent Personal taxes		3,319.47	
Delinquent oiling taxes		1,475.99	
Delinquent Merchants taxes		353.44	
			8,097.54
Treasurers acct	Genl Fund	$ 358.77	
" "	Fire Equip Fund	425.23	
" "	Sewer Fund	4,897.33	
" "	Water Wks Bond	" 2,466.17	
" "	Elec Lite Gt	" 75.00	
" "	Water Gt Fund	382.50	
" "	Elec Lite Genl	" 1,362.71	
" "	Water Genl Fund (overdrawn)	21.72	
			9,945.99
			$166,257.52

Liabilities.

Sewer Bonds outstanding	39,000.00
Water Works Bonds Outstanding	100,000.00
Bonds outstanding on current revenue	3,500.00
Bal due on water works construction	3,066.44
Accounts payable, wholesale	11,258.59
Salaries for May	881.40
Accrued interest on Water bonds	1,687.50

Accrued interest on Sewer Bonds	681.66	
Street Lights & Flush tank water	631.43	
Overdraft on Electric Light General Fund	2,378.56	
Overdraft on water general fund	458.42	
	163,544.00	
Assets in excess of liabilities to Balance	2,713.52	$166,257.52

134 Tabulated statement of receipts and disbursements of the City of Harrisonville, Mo., for the period ending June 2nd, 1930

To			
General Fund Receipts.			
Balance on hand May 5th, 1930		$ 185.12	
Cash Currents & delinquent taxes, real, per. merc.		52.65	
" Occupation taxes		52.00	
" Auto taxes		69.00	
Total cash receipts Genl fund		358.77	
General Fund Disbursements.			
By F. E. Cummings salary	$ 25.00		
" J. T. Honley "	25.00		
" J. T. Honley commission on collections	11.00		
" J. T. Honley killing 9 dogs	9.00		
Davis Bros Garage May acct	8.60		
Cass County Democrat, Memorial Day Proc	2.00		
Collins & Shepherd, May Charity Acct	17.12		
Miller & Collup, May account	10.00		
Will Clemments, May account	1.25		
L. E. Peck Motor Company, May acct	1.11		
Secton Ptg Company, May acct	7.20		
Indept Oil & Gas Company, May acct	18.48		
Cable & Collup, May account	2.30		
George C. Carter, May account	.32		
J. R. Ewing, orders paid on Mayors checks	232.00		
Total disbursements	370.54		
Disbursements over receipts overdraft		11.77	
	370.54	370.54	
Sewer Fund Receipts.			
To balance from April, on hand May 5th		4,844.68	
" cash received from taxes		52.65	
No Disbursements, Bal on hand June 2nd			$4,897.33

Fire Equipment Fund Receipts

To	Balance on hand May 5th		414.70	
"	cash received from taxes		10.53	
	Total Receipts		425.23	

Disbursements Fire Fund.

By	Hurley Lee Spicer Post #42	$37.50		
"	" " " " "	25.00		
"	Cable & Collup May account	8.24		
"	Cass County Telephone Co. May acct	3.50		
"	Davis Bros Garage May account	7.50		
"	J. C. Patrick, Rent for May	25.00		
	Total Disbursements	106.74	106.74	
	Balance on hand Fire Department June 2nd			318.49

Water Works Bond Fund Receipts.

To	balance on hand May 5th		2,424.05	
"	cash received from taxes		42.12	2,466.17

No Disbursements, Balance on hand June 2nd.

Water General Fund Receipts

To	balance on hand May 5th		000.00	
"	cash received from sale of water in May		830.18	

Disbursements.

By	overdraft from April 7th	$851.90		
"	Cleo Brown salary ½ May salary	50.00		
"	Eugene Callaway 1/3 May salary	45.00		
"	L. F. Topliff 1/3 May salary	33.33		
"	M. G. Holloway, 1/3 May salary	50.00		
"	C. V. Lynch, 1/3 May salary	25.00		
"	J. T. Bennett, 1/3 June rent	10.00		
"	P. K. Glenn & Co. May acct	21.75		
"	Deacon Hardware Co., May account	17.02		
135 By	Cass County Telephone Co., 1/3 May acct	3.53		
"	W. G. Clumm & Son, Apr. & May acct	62.77		
"	C. V. Lynch freight & Express	16.15		
"	General Chemical Co. Mch & Apr accts	68.00		
"	Allen & Glenn, Insurance	31.13		
"	Ulrich Supply Company March acct.	3.02		
		$ 1,288.60		
	Disbursements over receipts overdraft		458.42	

Light General Fund, Receipts

To Balance on hand May 5th		$ 000.00
" cash received for current in May		3,027.03
Total receipts		$ 3,027.03

Disbursements.

By Overdraft from May 5th, 1930	1,669.32	
" Cleo Brown, 2/3 May salary	100.00	
" Eugene Callaway, 2/3 May salary	90.00	
" L. F. Topliff, 2/3 May salary	66.67	
" M. G. Holloway, 2/3 May salary	100.00	
" C. V. Lynch, 2/3 May salary	50.00	
" J. E. Scruggs, all May salary	175.00	
" Ted Duncan, 216 ½ hour labor in May	86.50	
" Urlyss Duncan, Extra labor in May.	9.80	
C. V. Lynch, freight & Express pd.	61.39	
" J. E. Connely, insurance	51.28	
" Opal Brookhart, insurance	29.00	
" Allen & Glenn, Insurance	29.00	
" Ivan E. Nelson, insurance	31.22	
Deacon Hdw Company May acct.	7.46	
Cass Co. Tel Co., June rent May acct	7.07	
Sexton Ptg Company, May acct.	3.50	
Acme Petroleum Co., April acct.	435.42	
Indepet Elec Machy Co., Bal Mch acct	36.75	
Ben D. Prater, part payment on acct	310.78	
Columbian Elec Co. Part Feb account	159.01	
English Bros. Mch Company, Bal acct to date	33.84	
Graybar Electric Co., part on acct.	8.66	
Allen & Glenn, insurance on power hse	62.27	
Line Material Company on Feb acct.	95.21	
Vacuum Oil Company, on account	125.04	
M. G. Holloway ½ interest in light line Sth St to Vandeventer residence	42.96	
A. V. Vandeventer, ½ interest in light line Sth St to Vandeventer Residence	42.96	
Fairbanks, Morse & Co., rental on Machy for May 1930	600.00	
J. R. Ewing, orders pd on Mayors cks	885.38	
Total Disbursements	5,405.59	

Disbursements over receipts Overdraft....		2,378.56	
	5,405.59	5,405.59	

Electric Light Guarantee Fund Receipts

To balance on hand May 5th.....		60.00	
" cash received from consumers.....		15.00	
Total receipts.....		75.00	
Disbursements			
By refund to J. M. Garrett.....	$5.00	5.00	
Balance on hand June 2nd.....			$70.00

Water Guarantee Fund Receipts.

To Balance on hand May 5th.....		342.00	
" cash received from Depositors.....		39.00	
		381.00	

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Disbursements

By refund to J. C. Bridges.....	$1.50	1.50	
Bal on hand June 2nd.....		379.50	379.50
Total.....			$ 8,131.49

Recapitulation of the City Treasurers
Balance as of June 2nd, 1930.

General Fund.....		$ 000.00
Sewer Fund.....		4,897.33
Fire Department Fund.....		318.49
Water Works Bond Fund.....		2,466.17
Electric Light Guarantee Fund.....		70.00
Water Guarantee Fund.....		379.50
Total Funds.....		$ 8,131.49
Less Overdrafts.		
Electric Light General Fund.....	$2378.56	
Water General Fund.....	458.42	
General Fund.....	11.77	
	$2848.75	
Balance cash in all funds.....		$ 5,282.74

137 The witness continued: I have [—] around Harrisonville practically all my life, living on a farm part of the time and I am acquainted with Town Creek, which drains possibly sixty or seventy per cent of the town, that is the northeast part of Harrisonville and the north part and the west part. The remainder of the town drains into Muddy Creek. Prior to the construction of the sewer system the county sewer served the court house and I think the hotel and the jail and possibly some of the stores. It emptied into Town Creek. This creek runs close to the Oakland Cemetery. There is and for twenty years has been a slaughter pen on the banks of Town Creek and that has been in use practically all the time.

The rental value of pasture land in that community is from 3.00 to $5.00 per acre. The extreme north end of the Dickey land would be accessible for milk cows but the rest of it would not. They would have to cross two railroads, the Missouri Pacific and a branch of the Frisco, and the state highway No. 71 to get to the pasture. The rental value of the Dickey land west of the railroad is from $3.00 to $5.00 per acre per year upon the assumption that the water in that creek is in no wise injurious to cattle.

Cross-Examination

I am sure that the Court House and Jail were connected with the old septic tank, but I am not sure about the hotel. I never noticed any odor from the old septic tank, but I heard people complain about it. I never lived close to it and had no occasion to think about it. It is about a mile along the creek from the point where the old septic tank entered into the creek to the outlet of the present sewer system. During that distance the creek formerly ran through a little lake, which I think is now dried up. This Dickey land, a great distance south of the pasture now in controversy, was the old fair grounds on the east side of the track and used formerly for pasturing town cows. This creek does not run through that land. Some of the people in Harrisonville pay $2.00 or $2.50 per head per month for the pasturing of a town cow. Yes, sir, we have just completed a modern water plant in Harrisonville.

J. W. GEORGE called as a witness on behalf of the defendant, City of Harrisonville, testified as follows:

138 Direct Examination

I am a veterinarian and received my education at the Kansas City Veterinary College, have been in the practice

some twenty years in and around Harrisonville. I am acquainted with Town Creek and Muddy Creek and have been for that period. Prior to the construction of the new sewer system the county sewer discharged into that creek. I knew it served the Court House and the jail, but outside of that I don't know anything about it. Yes, sir, there is a cemetery on Town Creek before it gets to the Missouri Pacific tracks. It runs right along side of the cemetery, maybe within 200 feet of some of the graves. There is a slaughter pen on the creek that has been in use for the last twenty years, which drains into Town Creek.

Yes, sir, prior to the installing of the new city sewer there was sickness among the cattle down Town Creek. It was due to contaminated water and caused bowel trouble and diarrhea among the cattle and horses. The great trouble that I had at that time was on the Doc Elder pasture, which now belongs to Judge Bruce, and is just below Mr. Dickey's land. At that time I had no sickness among the cattle on the Dickey land. I don't think there were any cattle in it. I have treated the Dickey herd that runs on this pasture. They never at any time had any sickness down there that you could attribute to the water. I have been called in to the Dickey herd 100 times in general veterinarian practice to treat particular cases. Yes, sir I attended some of his cows for abortions, that is slipping of calves, but made no examination to see whether it was contagious abortion. I am not qualified to do that. It takes laboratory tests. These cases of abortion were not caused by the water. That has been since the installation of this septic tank. No, sir, I have never had any call down Town Creek on any case that I would attribute to the water since this Imhoff tank was installed. I have been along that stream both above and below that sewer outlet. As a vetrinary I would say that water would not be harmful to cattle even below the sewer outlet, and there are no more odors along that stream than there are along any other stream from decaying vegetation. When a person gets in the stream above the septic tank and wades around in it, it riles up from
139 below pretty black. Yes, sir. I have noticed the odors around the Imhoff tank, possibly 200 or 300 feet. I took some samples of this water with Mr. James, one of the attorneys for the defendant, City. One sample was sent to a pathological laboratory and the other to a chemist. There were five samples taken, I think. One at the outlet of the Imhoff tank where it enters the creek, one about twenty feet down the stream, one about fifty feet up the stream, one about

150 feet down the stream from the Imhoff tank and one about one-eighth of a mile. The samples were taken in pairs, two bottles in each place, sealed and marked and delivered to Mr. James.

Cross-Examination

Yes, sir, there was trouble with the cattle on Judge Bruce's place before he owned it and at a time before the Imhoff tank was built. We lost a few of the cattle, then I had the parties move them out of the pasture. I thought their condition was due to the bad water in the creek. It was low, a very poor water supply. I did not perform any autopsy on the cattle or make any tests to determine what the cause of the sickness was. I thought it was the water, because those that I moved out of th: e, when I put them on good water supply most of them straightened up and got all right. I have no way of knowing positively why some cattle died. The water at that time was contaminated from the creamer by running milk into this stream. Milk, you know, will putrefy and contaminate a stream quicker than anything else you can put in it because it is the greatest carrier of bacteria, if it isn't properly handled, of anything that we have. I am not a chemist and I made no tests of the water at that time. Yes, sir, I think the water on the plaintiff's land looks better at the present time than it did on Judge Bruce's place at that time. I don't think that there is the contamination that there was then.

I have been down to the Imhoff tank and watched the outflow from the tank. It is a kind of a bluish looking water. You might see the kind of deposits such as exist in the bottom of the plaintiff's Exhibit 5 in any creek. I have seen considerable quantities of the same thing in stagnant pools in Town Creek. I don't think it would injure cattle in any way to drink the water. Potability of water is a matter of chemistry and pathology, I think. No, sir, I am not a pathologist or a chemist, and have made no such tests of that water. I base my opinion upon the fact that it has never injured any cattle that I know of. There had not been any sickness down there in that pasture to my knowedge. There might have been cattle injured that I didn't know about. I live on the edge of Harrisonville, but I don't own any property in the city.

Redirect Examination

I am renting a pasture close to Harrisonville for approximately $3.00 an acre. Yes, sir, I am acquainted with the rental

values of pasture land in the neighborhood of Harrisonville. That is around $3.00 an acre and assumes that the water is good. This milk condenser that I spoke of was on Town Creek above the Dickey land.

Recross Examination

The creamery is not there now. The rental value for town cows around Harrisonville is $2.00 per head per month. It has been up as high as $3.00. That is the highest. That is not for the entire year, it is just for the grazing season. Usualy about six months. It takes about two and a half to three acres of pasture for one cow.

J. H. GRAY called as a witness on behalf of the defendant, City of Harrisonville, testified as follows:

Direct Examination

I reside in Harrisonville. I have lived in that part of the country all of my life and I am acquainted with the streams around there and have fished all around there, including Town Creek and Muddy Creek. I am familiar with the county sewer which served the Court House and all the public places around the square and discharged into Town Creek on the west. Town Creek cuts into the cemetery grounds and runs into what we know as Gulf Pond where there is a slaughter house. There are two slaughter houses, one is George Taylor's, located right down north of the filling station, and the other is Levy Smith's. One is down close to the cemetery, maybe 100 yards and the other half a quarter from the stream. George Taylor's is further south and runs right into that pond, Gulf Pond.

141 I was down Monday last and saw this stream and the plaintiff's pasture. The water above the sewer outlet is not much different from that below. Yes, along the creek you can smell a little odor. At about fifty or a hundred feet from the Imhoff tank you smell an odor. Last Sunday afternoon I was playing tennis and in swimming in the pond about one eighth of a mile away and noticed no odor at all from the tank. I haven't noticed any odor along the creek there, but I haven't been along there for about a year over on the west side of the railroad tracks.

Cross-Examination

I have been across the track to the place where the tank empties into the creek but not down the creek during the last

year. Yes, sir, I am a taxpayer in Harrisonville. I think they completed a new water plant there about six or eight months ago. It cost, I think, $100,000.00.

C. V. LYNCH

C. V. Lynch witness for defendant, City, being recalled testified as follows:

Direct Examination

By Judge Glenn:

"Q. State whether or not the City of Harrisonville has levied the full amount they are authorized under the Constitution for the general fund.

Mr. Hazard: That is objected to for this reason: It is no matter of defense because it assumes that the City of Harrisonville has the right to spend its general revenue for some other purpose rather than the construction of a proper disposal plant.

The Court: I do not know what the object is. I will admit it subject to the objection and deal with it hereafter.

Mr. Winger: I think the question as stated calls for a conclusion.

The Court: Yes, that would call for a conclusion because I assume that the facts would have to be detailed and then if you have the law, the law would say whether or not they had reached the limit.

142 By Judge Glenn:

Q. State the amount as levied for general purposes.

A. The last two years they have levied at the rate of fifty cents on the hundred for general purposes.

Q. The general fund, has that been used each month?

A. Yes, sir.

Q. Practically all of it has been consumed for the general expense of the City. A. Every month, yes, sir.

The Court: Fifty cents to the hundred, is that the maximum under the law?

Judge Glenn: Yes, sir, Section 11, Article 10, under the Constitution, and your Honor, we want to show that under that section referred to this morning, it says this additional septic tank could be built by permission of the council, out of the general fund, but we want to show there is no general fund from which to do this work. I believe that is all.

Cross-Eaxination

By Mr. Hazard:

Q. Do you know the method of valuation of property for tax levy in Harrisonville? A. Yes, sir.

Q. What is it? A. The method of valuation?

Q. Yes, is the property appraised at its full value?

A. The assessor makes a valuation.

Q. You don't know whether that is the full valuation or not?

A. I couldn't say whether that is the full valuation or not. The assessor makes the full valuation.

Q. That is the city assessor?

A. They have no city assessor. It is copied from the township assessor's books.

The Court: I understood the statute or the Constitution requires the property should be valued at its actual cash value, is that correct?

Mr. Hazard: Yes, sir.

Judge Glenn: And, of course, the assumption is the officers did their duty.

The Court: Regardless of the facts.

Judge Glenn: The County Clerk certifies to the City Clerk the tax books, does he not? A. Yes, sir.

Judge Glenn: The Assessments? A. Yes, sir.

143 Judge Glenn: That is all.

(Witness excused)

S. J. Hamilton called as a witness on behalf of the defendant, City of Harrisonville, testified as follows:

Direct Examination

I now live and have lived in Harrisonville about twenty-three years. I am engaged in farming at the present time, but was in the hotel business a good many years at Harrisonville. I was in the hotel business in Harrisonville though about eight years prior to 1925. At that time the city had a water supply from a lake up in the northeast part of town called Lake Luna. The water was used on the lawns and in the barber shops.

"Q. Did you have a connection with that in the hotel?
A. No, we didn't use it in the hotel. Well, I mean we didn't use it in the bath part of the hotel.
Q. Well, what I am getting at, did anybody use that water for drinking purposes?
A. Oh, I don't think so, no sir.
Q. Was it considered fit for human consumption?
A. Well, we never considered it so. We never used it at the hotel.
Q. Did the water have any odor about it?
A. Yes, sir, there was some odor."

I am familiar with Town Creek running through plaintiff's land. I live just above and I cross it every day or two, but I have only been down to the tank one time. My residence is three-quarters of a mile north and east from the tank. We never get any smell from the tank at our residence. I have been down to the tank and have detected a slight odor where the effluent ran out of the tank into Town Creek. I had to be right up to the creek to smell it.

I am familiar with the plaintiff's land. I have bought and sold farm lands in that vicinity and own real estate in that vicinity and have been trading in farm land and I think I am familiar with the values of farm land as they were in 1923. Sixty dollars an acre I would say was the reasonable market value of the plaintiff's land west of the Missouri-Pacific tracks and the present value I would say was about the same.

144 Q. Just tell the court what, in your opinion, was the reasonable market value of this 150 acres of land belonging to the plaintiff and lying west of the Missouri Pacific Railroad in the year 1923.

Mr. Hazard: Just a minute, please. We object to that for the reason—

The Court: In the premise that it is not the issue here in this proceeding?

Mr. Hazard: Yes.

The Court: We are not trying an issue for a condemnation. The plaintiff has no right to recover here on that.

Mr. James: Our theory is we are entitled to show the reasonable market value of this land as of the date when this tank was constructed and now for the reason there might be a situation here where damages claimed and attempted to

be proven by the plaintiff would exceed the entire value of the land.

The Court: Well, upon that theory it might be competent, but not upon the theory of damages.

Mr. James: That is the theory, if your Honor please, on which we are offering it.

Mr. Hazard: It seems to me the defendant must rebut whatever evidence of damage is put in which is evidence going to the same character of damage.

The Court: I think if you are proposing to show the damages claimed should not be the same as they are, if that is the objection you can rebut that. I can see where it would be competent for that reason. The objection will be overruled."

Sixty dollars an acre I would say was the reasonable market value of the plaintiff's land west of the Missouri-Pacific tracks and the present value I would say was about
145 the same.

Yes, sir, I am taking into consideration that some permanent roads have been constructed down there since 1923. Land generally isn't as high as it was in 1923, but I think the improvements in the way of the roads in that particular place would make it about the same, would even up for the general decrease of farm values.

I was over this land since the tank was installed, just a few weeks ago. The cattle graze along this stream and up around the outlet of the tank eat the grass. I have seen them there.

Cross-Examination

We used the Lake Luna water as running water in the baths, but for drinking water we had a big cistern right at the door. At times the water didn't smell so bad, but I had a barber shop in connection with the hotel and you could notice it very much on the towels when you put them on the face. A lot of the customers complained of it. I was last down to Town Creek on the plaintiff's property about 6 weeks ago, went into the pasture just there opposite the tank and down a few steps below. I noticed in particular that the grass was right up around close and I have seen some cattle there, about 60 or 80 yards away at the time and I have seen since where they grazed right up close. The old sewage outlet used to be about a half mile above where the Imhoff tank is now.

Redirect Examination

I think I have a good idea about rental values for grazing land around Harrisonville and assuming that the water in this Town Creek is pure for live stock I would say that the rental value of it was around $3.50 per acre per year.

W. R. SHELTON called as a witness on behalf of the defendant, City of Harrisonville, testified as follows:

Direct Examination

I moved to Harrisonville in the spring of 1913. At present I live a mile north thereof as the manager of the County Farm. I don't own any farm land at the present time, but have dealt in farm land in that vicinity, both as an agent and owner and was familiar in 1923 with the value of such land in Cass County, particularly that adjacent to Harrisonville.

"Mr. Hazard: (representing plaintiff) Your Honor, I want to anticipate the testimony and just add one fur-
146 ther ground to the objection. The value of land is determined by its capacity to produce income and I do not think that testimony, opinion testimony as to value, refutes prior testimony as to the income capacity of land, so I wish to add that ground to the objection.

"The Court: It will be received subject to the objection."

I am now familiar and in 1923 was familiar with the plaintiff's land in question about just west of the Missouri Pacific right-of-way. The reasonable market value of that land in 1923 in my opinion was something like $55.00 or $60.00 an acre and the present reasonable market value, is $50.00 an acre. Land is selling for less money all around now than it was in 1923. I have been down to the outlet of the sewer into Town Creek, at least twice that I remember. I noticed some odor around the outlet and possibly back forty or fifty feet. I am familiar with the rental values of land of this character around Harrisonville and in my judgment this land that is used for pasture purposes has a rental value of $3.00 or $3.50 an acre, that is assuming that the water course there is fit for cattle. When I was down there I could see signs of the cattle all around over the pasture. They had cropped the grass. I was down there on June 6, 1929 at the time some samples of water were taken and some pictures were also taken. Dr. George was also present and Mr. Bowman took the pictures. Also Judge Glenn was there. This photograph, defendant's Exhibit E, was taken there on that

occasion, June 6, 1929, and is a correct representation of the situation on that date. The pasture is just west of the railroad track. The sewer outlet into the stream is just on this bank here below where the men are standing.

I was also there on September 26, 1929, when other pictures were taken. At that time we measured the locations with a tape line and stepped off one of the long distances and made a note of them in the memorandum book which contains my signature.

J. H. NOWLIN, called as a witness on behalf of the defendant, City of Harrisonville, testified as follows:

Direct Examination

I live in Cass County about six miles due south of Harrisonville, right down Highway No. 71, and have lived in that community about twenty-one years and I am engaged in the farming and live stock business, and I am now and was in 1923 familiar with the price of pasture farms in
147 and around Harrisonville. I own land down there. I am familiar with the plaintiff's property on the west side of the Missouri-Pacific tracks.

"Q. And what, in your opinion, was the reasonable market value of that tract of land in 1923?

Mr. Hazard: Same objection.

The Court: Yes, same ruling.

By Mr. James:

Q. What, in your opinion, was the reasonable market value of that tract of land in 1923, seven years ago?

A. '23, seven years ago? Well, land sold pretty high about then, I don't hardly know what it would have brought —brought pretty near all kinds of prices".

Its reasonable market value in 1923 was around probably $50.00 an acre. The reasonable rental value of that property is $3.00 to $3.50 an acre per year. Yes, sir, I have seen cattle grazing around in plaintiff's pasture around the outlet from this Imhoff tank, and I didn't see any difference in the grass there from any place else. I want to add that the answers I have given about the reasonable market value of the land and its reasonable rental value are based upon the assumption that the water is fit for cattle consumption.

Cross-Examination

The last time I was down there on the creek was yesterday morning. I went down to the outlet of the sewer and then down the creek a ways.

"Q. And you think that water is fit for cattle to drink, do you?

A. Why, yes, that is, it looks that way to me.

Q. You don't really know whether it is good for cattle or not?

A. Oh, I don't know what is in the water, no, sir."

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148 JOHN R. JAMES, called as a witness on behalf of the defendant, City of Harrisonville, testified as follows:

Direct Examination

I am one of the counsel for the defendant, City of Harrisonville, and engaged in the practice of law in Kansas City, Missouri, associated with the law firm of Cleary & Barnett, with whom I have been associated for the last nine years. I made a trip to Harrisonville for the purpose of taking samples of water out of the creek there. I took two sets of bottles, one that I picked up at the Kansas City Testing Laboratory at 7th and Baltimore and another from the Kinsley Laboratory in the New Center Building at 15th & Troost, and took those bottles in my car and went to Harrisonville and found Dr. Shelton. We went to the sewer outlet and filled these bottles at the sewer outlet and up and down the stream from the outlet, and made a memorandum at that time of the samples. I did the marking of the
149 bottles myself. We had some seals, little stickers, we put on the bottles and I numbered one set with letters and one set with numbers, and delivered one set back to the Kinsley Laboratory and the other set to the Kansas City Testing Laboratory on the same date with the numbers and letters on the bottles. No. 1 and No. A were taken right at the outlet, No. 2 and No. B, twenty feet down stream from the outlet, No. 3 and No. C fifty feet up stream from the outlet. No. 4 and No. D 150 feet up stream from the outlet, No. 5 and No. E 150 down stream and No. 6 and No. F an eighth of a mile down stream. We measured all the distances with a tape measure, except the last two, which we stepped off. I simply put the numbers and letters on the bottles and did not acquaint chemists or the pathologists with the locations from which the samples were taken. Exhibit E is a correct photographic representation of the

point right over the outlet of the sewer. It shows a cattle path running along between the top of the bank and the west railroad right-of-way fence. We wanted to show that the cattle frequented this particular spot in the pasture. The parties shown in the picture are myself, Judge Glenn and Mr. Shelton. Exhibit F is another photograph taken on that occasion. This was taken up the stream from the outlet and the cattle path shown in the other Exhibit runs right along this fence in Exhibit E and to the north and then turns northwest and crosses this creek after the creek makes a bend. This crossing is shown in Exhibit F. I have visited this Imhoff tank and Town Creek across from it twice, I believe. Both in the year 1929, first on June 6, 1929, when we took these pictures and later this year just shortly before this trial. On the first occasion we didn't go over to the tank. We crossed the railroad right-of-way south of the tank after coming down the golf course. There was a little odor on that trip right over and around the outlet. If you got a short distance away you didn't notice it at all. On the second occasion the odor was more pronounced. This visit was more for the purpose of observing the tank and how it worked and we went over and around and above the tank and then we went over to the creek. It was a sort of damp day. The first odor we detected was right in the corner of the golf course and probably more than fifty feet away from the tank and when we arrived at the creek I could not detect the odor further than 75 steps from the creek.

On the first trip I was down there I saw cattle in the pasture and observed them down stream just a short distance. When we got there I don't think they were over a couple of hundred yards away. They had been over around there as shown by this picture here. There was a cow path right over the outlet, going up the creek and across the creek and the grass was cropped rather short all around there, and showed plenty of signs of grazing. On the last occasion I noticed the cattle had been grazing there but I didn't see any cattle in the pasture that particular day.

Cross-Examination

By Mr. Hazard:

Q. Mr. James, do you know why that cow path is there?

A. There is no way of ascertaining that I know of why cattle will make a cow path. They have that habit of making cow paths.

Q. Don't you know that the ford for this creek is above the sewer outlet and the cattle have to come along that path in order to cross the creek?

A. The what you say is above?

Q. The cattle have to come along that path in order to cross the creek above the outlet?

A. Well, they can cross it below the outlet, do cross it below the outlet.

Q. Did you examine that creek carefully below the outlet to see whether there is a ford?

A. Is there one? I don't call it a ford exactly, there is a place where the cattle cross over a little ways down.

Q. Isn't that place above the outlet?

A. No, there is one just a short distance above the outlet.

Q. And is that the one this path leads to?

A. That is right, the one below is further down the creek.

Q. Do you know how far down?

A. No, I wouldn't be able to say, Mr. Hazard, how far that is. I am not a very good judge of distance.

Q. Now this ford that is above the outlet is quite shallow, isn't it?

A. Oh, yes, it is just sort of a riffle there. They always naturally go across the riffles, make their cow paths across the riffles.

Q. And this path leads right down to that? A. Yes."

Redirect Examination

Exhibit E shows a bank probably about as high a spot on the bank as there is. The bank runs up and down. At places where there are riffles the bank is lower. This is a narrow, very crooked stream, and the place below the sewer
151 outlet where the cattle cross to which I have referred is a place where the banks come down close to the stream again, also more or less of a riffle.

Dr. John D. Ray, called as a witness on behalf of the defendant, City of Harrisonville, testified as follows:

Direct Examination

My profession is that of veterinarian. I am associated with the Kinsley Laboratory in Kansas City, Missouri, a partner in the institution. We occupy about seven rooms in the New Center Building. I am a graduate of the North Carolina State College, Bachelor of Science degree in Agriculture in 1915; graduated from Kansas City Veterinary College in 1917 with a degree of Doctor of Veterinary Medicine, and was at one time an instructor in that institution. I worked in the Kinsley Laboratory while I was a student in the Kansas City Veterinary College and after graduation I

continued in the Kinsley Laboratory and was an assistant instructor in the college until I went into the army in July, 1918. When I returned from the Army in December, 1918, I returned to the Kinsley Laboratory, and I am now a partner in that business. We do a general laboratory diagnosis for veterinarians, consisting of both bacterialogic and pathologic diagnoses and we make vaccines for animals and serums. Our business extends practically all over the United States and once in a while in foreign countries. Dr. Kinsley, the head of the laboratory, is abroad at the present time.

I recall Mr. John R. James delivered me some samples of water on the 6th of June, 1929, of which I made an analysis, bacterialogic count, of the different samples, and made a report to the defendant's counsel of my findings. Defendants' Exhibit G is that report.

Defendants' Exhibit G.

"Kansas City, Mo.
June 12, 1929.

Mr. Raymond G. Barnett,
1118 Garritt Bldg.,
Kansas City, Missouri.
Dear Sir:

152 We have made a Laboratory examination of the six samples of water brought in June 6th and wish to report the following approximate bacteria counts:

No. 1	110,000	Bacteria	per	CC
No. 2	3,100,000	"	"	"
No. 3	55,000	"	"	"
No. 4	200,000	"	"	"
No. 5	450,000	"	"	"
No. 6	600,000	"	"	"

A further test indicates that all of these samples were contaminated with members of the colon typhoid germ. This usually represents pollution of animal origin and would be expected in streams draining pastures, barn lots, or other sewage contaminated areas.

We trust that this information will be of some value to you, and if further information is desired it will be cheerfully given.

Yours very truly,
KINSLEY LABORATORIES,
Per J. D. Ray (Signed)

JDR-S

On September 27, 1929, Mr. Barnett personally delivered to me certain samples of water of which I started the examination. They were completed in the laboratory, but Dr. Kinsley made the final report. Defendant's Exhibit H is the report made by Dr. Kinsley on that occasion.

"Mr. Barnett: We offer in evidence Exhibit H.

Mr. Hazard: Objection is made to Defendants' Exhibit H for the reason that the Exhibit is not identified, location from which samples were taken. There is no connection in the record between this report from the Kinsley Laboratory and the stream in question. Further ground for the objection is that the witness testified that he did not himself make this report or complete the tests upon which it is based.

The Court: Objection will be sustained.

Mr. Barnett: If I may interrupt the witness at this time, I will have to testify to two or three formal matters myself."

RAYMOND G. BARNETT, called as a witness on behalf of the defendant, City of Harrisonville, testified as follows:

153 Direct Examination.

I am one of the attorneys for the defendant, City of Harrisonville, and in the preparation of this case for trial visited that City and particularly Town Creek, on one occasion on September 27, 1929, when I took samples from Town Creek. I first picked up a group of bottles given me by the Kansas City Testing Laboratory, likewise a group of bottles from the Kinsley Laboratory, they were sealed, and took the two groups of bottles to Harrisonville, met Judge Glenn and Mr. Shelton and two other gentlemen. We went to the creek and the samples were taken in pairs, one bottle out of each of the two groups of bottles. As soon as the samples were taken the bottles were sealed and I brought them back in that condition, turned one group over to the Kinsley Laboratory and the other group to the Kansas City Testing Laboratory. They were furnished me by the laboratories in order that I might have sealed and sterilized bottles. I have here a memorandum which I made at the time in company with those other gentlemen when we measured off the distances and the two samples marked No. 1 were taken ninety-five feet above the outlet of the sewer. Two samples, marked No. 2, were taken 190 feet above the outlet. Two samples marked No. 3 were taken 30 feet below the outlet, two samples marked No. 4 were

taken 95 feet below the outlet, the two samples marked No. 5 were taken 230 feet below the outlet, and one bottle, a sixth sample, 560 feet below the outlet. In the other group of bottles there were only five so that this sixth sample was taken in one bottle only instead of in pairs. I delivered one of these groups of bottles to the Kinsley Laboratories and the other to the Kansas City Testing Laboratories, giving no information whatever as to where the samples were taken, the bottles being merely marked with these numbers and no information on the bottles to show where they were taken.

DR. JOHN D. RAY, recalled by the defendant, City of Harrisonville, testified further as follows:

Direct Examination.

Q. To what extent, Doctor, did you have anything to do with the making of the tests on these samples delivered to your laboratory on September 27, 1929?

A. I received the samples and started the test, but did
154 not count the colonies in the plates that were pulled.

Q. Did you have any arrangement with your associate, Dr. Kinsley, with reference to doing that? A. Yes, sir.

Q. Who did do it? A. Dr. Kinsley, personally.

Q. Are you familiar with his signature? A. Yes, sir.

Q. Is this his signature on the bottom of the letter?

A. It is.

Mr. Barnett: We offer Exhibit H in evidence.

Mr. Hazard: The objection is renewed on the ground that Defendants' Exhibit H is hearsay. The witness testifies he himself did not make the count which is, of course, the whole substance of the testimony.

The Court: It would not be competent, gentlemen, unless it were an official document of some sort, required to be kept. It is a private document.

Mr. Barnett: Of course, this is a report made by a business institution. Dr. Kinsley himself is absent in Europe at the present time.

The Court: It is just the same as if he told somebody that. The letter would have no further significance than if he told somebody what the results of his test were and he were telling that to us.

Q. (By Mr. Barnett) I will ask you if you made any check of that count yourself?

A. I was out of the city.

The Court: The objection will be sustained."

(To the ruling of the Court the defendant, City of Harrisonville, at the time duly excepted and still excepts.)

Exhibit H is in words and figures as follows:

Defendants' Exhibit H.

"Kansas City, Mo.
Sept. 30, 1929.

Mr. Raymond C. Barnett,
1118 Scarritt Bldg.,
Kansas City, Mo.

Dear Sir:

We have made a laboratory examination of the 6 samples of water delivered to the laboratory on September 27th, 1929, and wish to report the following approximate bacterial counts:

No. 1—	252,000	bacteria	per	CC
No. 2—	2,050,000	"	"	"
No. 3—	4,040,000	"	"	"
No. 4—	2,375,000	"	"	"
No. 5—	1,650,000	"	"	"
No. 6—	1,970,000	"	"	"

We trust that this information will be of value and if further information is desired, same will be cheerfully given upon request.

Yours very truly,

KINSLEY LABORATORIES,
Per A. T. Kinsley (signed)"

ATK:s

The witness continuing: Referring to Exhibit G in evidence, I wish to say that in my judgment as a witness there is nothing appearing in that analysis showing that the water is unfit for stock consumption. Neither does anything appear in the chemical analysis shown in defendants' Exhibit I indicating that the water is unfit for cattle consumption. Nor is there anything in defendants' Exhibit J, as chemical analysis, which indicates that the water carrying those chemicals is injurious to stock to drink.

We don't ordinarily consider human contaminated water dangerous to stock, but water contaminated from animal origin would be considered worse than of human origin. We do not consider that diseases of human beings, diseases of the alimentary tract are transmissible to cattle and stock. Cattle customarily drink the water that they stand in and defecate in and tramp around in and even that water is not ordinarily considered dangerous for cattle to drink. And yet I would consider such water more dangerous or more likely to be dangerous to stock than water showing the bacterialogic count in Exhibit G and the chemical analysis in Exhibits I and J, because the water which is cattle contaminated would have a chance of having parasitic diseases or some cattle condition that wouldn't be found in water that has not been associated with contamination of fecal matter from cattle. I find nothing in Exhibits G, I and J to indicate that water of that character would cause a cow to slip a calf.

156 Cross-Examination.

No, I have not seen the source from which these samples were taken. It is usual for cattle to pasture in land through which a creek runs and to drink the water in the creek. In making my tests I used a standard agar. The incubation period was forty-eight hours at thirty-seven degrees centigrade. I don't remember the dilutions that were made but there were several dilutions used. The dilution water was sterile. I received the samples, which are the basis of the report marked Defendants' Exhibit G, on June 6, 1929. I had no knowledge of the taking of the samples or transportation of them to my laboratory. The taking of the samples under proper conditions is an essential feature of the test.

"Q. Now, I will call your attention to Defendants' Exhibit G, and I will ask you to notice No. 2, and state the number of bacterial count that that shows.

A. Three million one hundred thousand.

Q. Now, what is the number of the count in No. 3?

A. Fifty-five thousand.

Q. Now, assuming that those samples were taken from a creek and the one showing three million one hundred thousand count was taken at a point seventy-five feet lower than the one showing fifty-five thousand, would you say that your tests show some radical change in the water in that creek?

A. I would say it shows a radical difference in bacterial content.

Q. Well, what conclusion do you draw from that? There is a space of just seventy-five feet in the flow of the creek.

A. I would consider that there was possibly a difference in the character of the stream where they removed these samples.

Q. Some difference in the character of the stream, and would you say that that difference would be great?

A. Well, I wouldn't say it was so very great.

Q. Well, it is the difference between three million one hundred thousand and fifty-five thousand?

A. The difference would be entirely dependent upon getting just one little lump of dirt into a sample and checking it up.

157 Q. Well, then, you think possibly that might be explained by some lack of care in the handling of these samples? A. Not necessarily.

Q. Well, then, why did you refer to the lump of dirt?

A. Material floats in the stream. The reason that I answered that way, any debris that floats in a stream would get into a bottle and would make a difference.

Q. Well, then, if such differences as that are possible, can you place any reliance upon your test of samples that you did not take yourself?

A. All I have to rely on is what I found in the bottle submitted.

Q. I will show you Plaintiff's Exhibit 5 and I will ask you to assume that in the creek from which the samples of water were taken which were the basis for your report, Plaintiff's Exhibit G, between the point where your sample showed a 55,000 bacteria count and the point where your sample showed a bacterial count of 3,100,000, the outlet from a sewage disposal plant flows into the creek, and from the water in the creek below the outlet of that sewage disposal plant, this sample contained in Plaintiff's Exhibit 5 was taken. Now, with that information, would you say that your examination and your report has any bearing on the condition of pollution in that stream below the sewer outlet?

A. That jar of water won't have any bearing on them,—

Q. (Interrupting) No, I am asking about your tests?

A. I don't think a condition like that in the bottom of a creek would make any difference.

Q. That was not my question, doctor. I asked you, with that information contained in my hypothetical question, whether your report would have any bearing upon whether or not the condition of pollution exists in that creek?

A. Well, my report would indicate that there was more organisms down the stream than there is up the stream.

Q. Yes, and might that be due to the injection of the outflow from the sewage plant into the stream?

A. Yes, sir.

158 Q. Now, you spoke of contamination from cattle and your report states that a further test indicates that all of these samples were contaminated with members of the colon typhoid group. You don't get that group from cattle contamination, do you? A. Yes, sir.

Q. You do? A. Yes, sir.

Q. Did you isolate any typhoid bacillus?

A. No, sir.

Q. You don't get the typhoid bacillus from cattle contamination, do you A. No, sir.

Q. Now, is it true that in the taking of the sample of water that the result from the subsequent tests may be affected by very slight things; for instance, such as touching the cork with your finger?

A. Well, that would cause a variation in the test, yes.

Q. You would always prefer, wouldn't you, doctor, to take your own samples under the control conditions that you know how to regulate?

A. That is the ideal method for a test.

Q. Were any samples brought to you that looked like this? A. No, sir.

Q. Was the water brought to you clear?

A. No, sir.

Q. What was the color of it?

A. Well, it was clear after it would settle out, but it had more or less sediment in it.

Q. You mean something like the sediment in the bottom of that bottle there?

A. Well, something of that nature.

Q. The sample that was brought you looked about like that, did it?

A. Well, some of them looked worse than that.

Q. But that was the nature of the sediment that was in it?

A. Well, you could see it in the form of flocculation.

Q. Now, doctor, if a sample had been brought to you like this, would you say that such a sample would show the same result that was shown by your report here?

A. No, sir.

Q. What results would it have shown?

A. If it was dug out of the bottom of a creek you probably couldn't count them.

Q. Couldn't count what?

A. The bacteria.

Q. Three million wouldn't be a start?

A. No, sir, it wouldn't make any difference where you got it.

159 Q. Now, you know, doctor, that a condition like that in the bottom of a creek, if that creek is stirred by a cow stepping into it, or by any disturbance of any nature, that that would permeate the whole body of water?

A. Yes, sir.

Q. And if water that is even as clear as that has this below it is stirred, the sample taken from water like that would show vastly different results than the ones brought to you? A. I think so.

Q. You made the remark, doctor, that samples taken from the bottom of a creek would show vastly higher bacterial count, and it wouldn't make any difference where it was taken from. What did you mean when you said it wouldn't make any difference where it was taken from? Did you have reference to this sewer outlet?

A. It might be taken above or below the sewer and taken off the bottom of the creek and you would get enormous counts, regardless of the sewage pollution.

Q. You are speaking of any creek that carries some decayed vegetation?

A. Yes, sir.

Q. And would the fact that if you took such a sample from the bottom of the creek and got such an increased bacterial count still indicate that the water was unfit for cattle consumption?

A. I wouldn't consider it so.

Q. Something was said there about a count of 3,100,000 specimen and a count of 55,000 on another specimen, and you stated that that didn't represent a very great difference. What do you have in mind is a great difference in the matter of bacterial count?

A. That is merely an arbitrary figure. In water for live stock if you had a hundred million against one hundred thousand it would make quite a difference.

Q. How high would your bacterial count get before you could begin to consider whether it is dangerous for stock?

A. I don't know.

Q. You don't know. A. No, sir.

160 Q. Well, would water with a bacterial count of three million as is shown in one specimen there indicate any danger to cattle in the use of that water?

A. Not unless it contained pathogenic organisms for cattle.

Q. There is some reference here in a letter about tyhoid bacillus. Would the appearance of that typhoid germ in

the water if it were a typhoid germ coming from human sewage represent any danger to cattle?

A. No, sir. I used the reference of colon typhoid group in the broad sense in that typhoid organisms from human colon organisms are grouped bacterialogically in the old standards as belonging to the same group.

Q. And the finding that you made in that particular point didn't indicate any danger to the cattle?

A. No, sir.

Q. Did you know that there were three and thirty-five hundredths inches of rain within six days or a week preceding the time these samples were taken?

A. I didn't know how much. I know it had rained recently when—I don't remember which one, but one was taken after the rain.

Q. That would have an effect on the character of the samples taken from the creek, would it not?

A. Yes, sir.

Q. Now, you don't mean to say that the injection of this sewage into the creek makes no difference in the potability of the water below the sewage outlet, do you? I will ask you further to assume that the sewage plant has a capacity of one hundred thousand gallons a day and that the creek is a small creek, sometimes dry except for its pools.

A. That kind of water isn't considered injurious to animals.

Q. What kind of water?

A. Water from sewage outlet.

Q. Well, I will ask you to further assume that tests in that creek below the sewage outlet showed no dissolved oxygen whatever; is such water fit for consumption by animals?

A. What difference does it make?

Q. Well, I am asking you a question?

A. We have no record of any injury from such water.

Q. What do you mean by "such water"

A. Water from sewage contaminated creeks in the condition you describe here.

161 Q. Then your testimony is that a fluid in this creek which contains no dissolved oxygen is fit for consumption by animals, is that your testimony?

A. Yes, sir.

Q. And your testimony would be that in dry times when the creek bed was almost entirely dry, the animals might drink the sewage outflow without harm?

A. I think so.
Q. Will cattle drink such fluid?
A. Yes, sir.
Q. Do you recommend that type of water for cattle?
A. I wouldn't recommend it if you had good water in place of this. I will make a reservation on my answer with reference to the danger of this sewage outflow. If this sewage contains poisonous chemicals other than human excreta it would be dangerous to cattle.
Q. Well, assuming that it is the sewage outflow from a town, normal sewage flow, your testimony is that it is adequate watering for cattle? Is it, doctor?
A. I don't think it would hurt them.
Q. You don't think so? A. No, sir.
Q. Just as good as water that is unpolluted by sewage?
A. As far as you can tell from the cow.
Q. You would just as soon turn cattle into a pasture with an open sewage polluted stream as one which was free of sewage?
A. Just your human dignity would be the only thing that would make any difference in my judgment.

Would cattle watered with sewage pollution thrive just as well as cattle watered with fresh water, pure water?

Q. Well, there might be a difference over a long period of time.
Q. Well, how much time? A. Six months.
Q. Well, now, assume a condition which has obtained for five years in which a small creek almost dry at times, receiving the outflow from an Imhoff tank that has a capacity of a hundred thousand gallons a day, what effect would you say that type of watering would have over a five year period on a herd of registered blooded cattle?

Mr. Barnett: That question is objected to for the
162 reason that it is not founded upon any facts in evidence. The evidence is to the contrary, that there is water in this stream up above the sewage outlet in this pasture, there is water in Muddy Creek in this same pasture before it gets to the junction with this stream, that there is water in some pond upon the place, that the cattle have not been drinking continuously and uninterruptedly of this one source during the entire period, that they have been in the pasture.

The Court: The objection is overruled. Let him answer the question. Let's see what he says. I understood, how-

ever, that the cattle were not drinking this water at all, that they refused to drink it.

Q. Yes, there is testimony to the effect that they refused to drink it, also testimony at times when there was no other place to drink, they drank it.

(To which ruling and action of the Court, the defendant, City of Harrisonville, at the time excepted and still excepts.)

A. Well, I don't think over a period of five years you would have these stagnant holes that the cows would have to drink out of over a period of five years.

Q. That isn't the question. The Court will let you assume the facts I have stated and you can make an answer as an expert on the basis of that assumption?

A. I don't know.

Mr. Hazard: That is all.

Redirect Examination

By Mr. Barnett:

Q. Doctor, have you ever heard of any tests being made where cattle were limited for their water supply to water containing human sewage over a period of five years?

A. No, sir.

Mr. Barnett: That is all.

(Witness excused)

Orion J. L. Brookhart called as a witness on behalf of the defendant, City of Harrisonville, testified as follows:

Direct Examination

163 I live in Harrisonville, Missouri, and yesterday evening upon adjournment of this trial I received instructions from Judge Glenn to take some samples of water out of Town Creek and did take such samples both above and below the outlet of the sewer. This one (defendants' exhibit K) which is marked No. 1, was taken 91 steps below the sewer outlet of this Imhoff tank into Town Creek. No. 2 (Defendants' Exhibit L) was taken 63 steps up stream from the sewer opening and Defendants' Exhibit M was taken 310 steps up stream from the sewer opening. The two dark ones here taken above the sewer outlet were taken in the stream after I stirred it up. I didn't take it from the bottom of the stream but from the body of the stream after stirring it up by walking in the stream. Exhibit K was just lowered down to where

the water ran over a little limb that had fallen across the stream and let it run full of water, holding the neck of the bottle so that the water would run in. It was possible to get samples down stream that would be just as dark as the samples shown in Exhibits L. and M. and possible to get samples up stream just as light as that shown in Exhibit K, which was taken below the outlet. The sample in the small jar was taken in water a little over knee deep and the one in the large jar possibly six or eight inches deep, and the clear sample was taken by holding the jar from the edge of the creek. The water there looked like possibly a foot deep.

I am familiar with the rental values in and around Harrisonville, and I am familiar with the plaintiff's property on the west side of the Missouri Pacific. The reasonable rental value of that land upon the assumption that the creek even below the sewer outlet is fit for cattle consumption is $3.50 to $4.00 an acre per year. In 1923 it had about the same rental value. I was familiar with Town Creek even before 1923 when the disposal plant was built, all the way from the northeast part of town to where it empties into Muddy Creek. There is no great difference between the present stream below the sewer connection and the character of the stream before the disposal plant was erected, except that probably below the outlet now it is slightly discolored, has a little whitish-blue cast to it, but no material difference. The stream now even above the sewer outlet carries a great deal of dead vegetation, logs, leaves, things of that kind that have col-
164 lected in the bottom of the stream and form a kind of black ooze. This is true of the stream both above and below the sewer outlet.

The water formerly piped over the City of Harrisonville from Luna Lake had quite an odor to it, which could be detected very easily, up in the city when the water ran from the pipes and faucets. I never heard of anyone drinking that water.

I have been in this pasture of the plaintiff since 1923 and I have observed that the cattle seem to graze along there all the time. I have seen them in there practically every time I go down there and in the last years I have been there real often, sometimes two or three times a week and sometimes it would be three weeks between times.

Cross-Examination

No, I did not wade out in the sewage in taking the sample below the sewer outlet. The water below the sewer outlet

did not smell bad at the place where I took the sample. I do not know what it is in the bottom of Defendants' Exhibit M, except that it is whatever was in the creek. I can't see any difference between the deposits in the bottom of Defendants' Exhibit M and Plaintiff's Exhibit 5, except possibly that that in Exhibit 5 is a little blacker. I did not stir up the creek where I took the sample (Exhibit K) below the outlet. I took it right off of the top of the water. I see very little difference between Defendants' Exhibit K and Plaintiff's Exhibit 3. Exhibit K is a little more cloudy than the other. Lake Luna flows into Town Creek only in periods of high water, that is, when it is low it doesn't flow over the overflow. I wouldn't consider the water in that creek good at any time. It is probably worse in hot weather. I oversee the sewage plant, have been in charge about three years. The by-pass exists for the purpose of by-passing sewage if it ever has to be done, while repairs were made on the tank, should it ever have to be repaired. I never use the by-pass. No repairs have been made on the tank in the last three years requiring its use. The only repair I recall was putting in one new valve and we put in a piece of tile out in the drive there. This by-pass has never been opened since I took charge of the plant. That exact date I don't recall. I know
165 nothing about its having been opened before that.

I am down there possibly two or three times a week and then sometimes it will be a couple of weeks between trips. I go down to make an inspection to see how the men are taking care of it, that they are giving it the proper attention, that is the men hired for that purpose. I am there sometimes when the men are and sometimes when they are not. There is never any occasion to open the by-pass that I can see. I inspect the by-pass, however, just look down the manhole, not every time I am down there, but practically every time. Yes, sir, the by-pass can be opened at any time and then the raw sewage would flow right around the tank. The way that is handled is to cut off the line that leads to the tank and that raises the water and makes it by-pass through a higher tile. No, I don't believe that any sewage can flow into the tank and through the by-pass at the same time, because if the openings to the tank are open it runs off into the tank at the lower level. It would, however, be possible if the water level at the intake were high enough. The difference in height between the inlet to the tank and to the by-pass is several inches, two or three, or five or six.

JOSEPH G. HAWTHORNE called as a witness on behalf of defendant, City of Harrisonville, testified as follows:

Direct Examination

I live in Kansas City, Missouri, and I am a chemist.

"Mr. Hazard: We will admit Mr. Hawthorne's qualifications."

The witness continuing: I have had samples of water from Harrisonville brought me by Mr. Black of Black & Veach. I received these samples four or five times and made a report each time. I also received samples from the firm of Cleary & Barnett. From the latter, defendant's attorneys, on one occasion I received samples on June 4, 1929, of which I made an analysis. The bottles were delivered to me sealed and capped. They were marked with the letters, A. B. C. D. E. and F. As far as I remember the water contained in the samples was of approximately the same color throughout. I had no knowledge as to whether the samples were taken above or below the sewer outlet. Exhibit I is my report and a correct chemical analysis of those samples that were
166 left with me. It is correct in so far as the determinations were made. It isn't a complete analysis of the water, but we determined certain things which are enumerated on the report.

"Q. And that analysis was made for the purpose, was it [now], of testing the usability of this water for stock?

A. Well, I don't recall precisely that the examination—recall making the examination for that purpose. It was made for, as I remember, for the purpose of determining whether or not the water was contaminated with sewage or similar contamination.

Q. And I will hand you Exhibit J, pages 1 to 5 inclusive, and ask you if these pages constitute a report which you made to the firm of Cleary and Barnett, concerning certain samples that were left with you on the 27th of September, 1929?

A. Yes, sir, they are reports of analyses of those samples.

Q. And in that case, Mr. Hawthorne, having reference now to the color of the sample, in that connection I call your attention to the varied-colored specimen that are here upon the Court's desk, differing quite extremely from quite dark to quite light. I will ask you if the samples that were delivered to you were substantially uniform in color?

A. As far as I remember they were turbid and uniformly turbid."

These samples were numbered 1, 2, 3, 4 and 5 and there was nothing to indicate whether they were taken above or below the sewer outlet and we had no information in making the report of our chemical analyses either in September or June, of the place where the particular samples were taken. Exhibit J is a correct analysis of the samples left with us in September. All of these samples show evidence of organic contamination, that is they are contaminated with organic matter, which is undecomposed and they are waters on that account which I would say are obviously not fit for human consumption, but probably could be consumed by an animal without causing disease in that animal. I include all the samples when I say that they are not fit for human consumption. We furnished the containers for these samples in order that the container would not of itself be contaminated. I refer to the containers furnished to Mr. James and Mr. Barnett.

167 Cross-Examination

Plaintiff's Exhibit 15 covered a sample taken 20 feet below the sewer and shows 399 parts of solids per million. And plaintiff's Exhibit 16, a sample 60 feet below the sewer outlet shows 497 parts of solids per million. On the face of the analysis this would show a difference above and below the sewer outlet and that there had been added by the material discharged into the stream from the sewer outlet 98 parts per million of solids. Plaintiff's Exhibit 15, an analysis of water from above the outlet, shows that the loss on ignition of total solids was 93 parts per million and plaintiff's Exhibit 16, an analysis of water from below the outlet, shows loss on ignition of 160 parts per million. This would show that there had been added to the water 67 parts per million of the material which is destroyed on burning and which is most probably organic matter, sewage. Plaintiff's Exhibit 15 shows that the oxygen consumed is 10.4 parts per million and plaintiff's Exhibit 16, 17 parts per million. That would be accounted for by the increase in organic matter, as the oxygen consumed is a measure of the amount of organic matter present and sewage contains organic matter. I would say that the water both above and below the sewer outlet is not good water. Of course the one having the higher amount of organic matter from a sanitary standpoint is not as good water as the other. Exhibit 17, a report of samples taken twenty feet above the sewer outlet shows solids 438 parts per million, and Exhibit 18, taken sixty feet below the sewer outlet, shows a total solids of 540 parts per million. These Exhibits and Exhibits 19, and

20, 21 and 22 are all reports I made on samples taken above and below the sewer outlet, tests made by me. In each case the total solids below the sewer outlet is greater than above and the same way with the organic matter, which is higher in each case in the sample taken below. The fact that a sewer outlet intervenes between the two points indicates that there is sewage pollution in the creek below the outlet that does not exist above the outlet.

Redirect Examination

168 The samples both above and below show that the water is unfit for human consumption. But both above and below it was fit for animal consumption without causing any disease in the animal.

Recross Examination

If there was dissolved oxygen present in the water above the outlet that would indicate that all of the organic matter—that there was no organic matter capable of further oxidation existing in the water, whereas, if in place of dissolved oxygen, the water below the outlet were capable of consuming oxygen, then that would show that there was present in the effluent entering into the stream, organic matter which was not fully oxidized, and would indicate considerable difference in the two waters. If there is no biochemical oxygen demand 100 feet above the sewer outlet and at a point sixty-five below the sewer outlet and fifteen hundred below the outlet the biochemical oxygen demand is seventy, that would indicate that above the outlet the organic matter which, provided there had been organic matter present in the stream, had become fully oxidized, whereas below, there had been added to the stream organic matter which is not fully oxidized and will require both time and distance to become oxidized. Raw sewage is organic matter that is not oxidized. The biochemical oxygen demand of one hundred ninety-eight at the outlet pipe where the sewage flows into the creek shows a relatively large amount of unoxidized organic material or raw sewage present in the effluent. Taking all these facts into consideration I would say that this water of the stream below the sewer outlet would not affect beef cattle very much, but that it wouldn't be very good for dairy cattle, not so much because of their drinking the water, but more because the animal itself might come in contact with water and thereby introduce into a dairy a type of contamination which is not desirable. As for a blooded herd where they are raising calves every year, high grade, blooded, registered stock, I must admit that I am not enough of a vet-

erinarian to fully qualify myself to answer the question. Of course in this whole question of sanitation and sanitary water supply the mind of a chemist or one dealing with water supply is usually devoted to most of the common
169 water-borne diseases which affect a human. The most common one is typhoid. I don't think cattle are susceptible to typhoid fever, and for that reason they are not subject to getting typhoid fever from a water supply. I can't see any reason why cattle would be harmed by such water, but of course, as I have said, in the case of dairy cattle the animal perhaps is out in the field and gets into a contaminated water supply which may contain the organisms of typhoid fever and might carry it into a dairy, and I wouldn't consider the water fit for dairy cattle. Fish will not live in such water as that below the outlet; they will not live in any water that doesn't contain dissolved oxygen.

"Q. Now, a condition where there is no dissolved oxygen at all, and the biochemical oxygen demand that begins with 198 and carries down the stream as high as a hundred, would you say that carried a condition of gross pollution, assuming of course, a stream can dry at times, a very small stream and assuming also an Imhoff tank with a daily capacity of 100,000 gallons?

A. Well, I notice you say the stream is dry at times. Of course, that is a very important factor. If there is always moving water in that stream, that is quite a factor in the destruction of this sewage, the movement of water going over riffles, contact with air. On the other hand, if the stream is one that will dry up in the pools at dry times of the year, then, of course, the pollution then is probably more apparent to the nose than anything else. That is, the decomposition ultimately takes place, but the stream is stagnant during that time.

Q. Such a stream would be pretty badly polluted, wouldn't it? A. Yes, I should say so.

Mr. Hazard: That is all."

(Witness excused.)

Other Witnesses

At this point in the trial for the purpose of shortening the examination it was agreed that the defendant, City of Harrisonville, had present in Court some ten additional witnesses, residents of Harrisonville and the vicinity thereof, and that among them were Jack Russell, S. M. Wirt and

MR. CARPENTER, who would all testify that the reasonable rental value of the property in question is $3.00 to $3.50 per acre and that this stream prior to the installing of the Imhoff tank was receiving sewage from the old county sewer and receiving the drainage from the City of Harrisonville and that on the banks of the stream there is a cemetery and a slaughter house and that the cattle on plaintiff's land, west of the railroad, ate the grass all along the stream and that the grass of the pasture was cropped close. Others of these witnesses were MR. M. E. HALCOMB, FRANK CONGER, MR. DAN DAVIS, MR. FRED J. THOMAS and MR. WALTER BENN, who would testify that they have played golf practically every day on the Harrisonville golf course for the last two years and that at no time have they smelled any odor from the sewage tank further away than fifty yards. Also among these witnesses are MR. WORD MATHEWS and MR. GRIFFIN, who would testify that prior to the installing of this Imhoff tank but not since that time there was a cream station or condensery for milk, on the creek, which discharged its water into the creek, and that this creamery was there up until at least 1920.

"Mr. Hazard: Objection is made to this testimony for the following reason: The showing of a condition of pollution in the creek from the natural wash from the city is not a defense to this cause of action. While the city may enjoy the rights of a higher riparian owner, so far as its natural wash is concerned, it has no right to collect its sewage into one point and discharge it into the water course and upon the land of a lower riparian owner, more than would result from it naturally. This objection is lodged to all of this testimony so far as it bears upon that point."

Mr. Hazard: I am referring to the cemetery and perhaps to the slaughter house and to all of the private sewage disposal plants that might exist. I am referring to the whole question of contamination in this creek above the outlet, and I have one other ground: Although a water course may in some measure be contaminated, such contamination does not give the upper riparian owners a right to increase by artificial means the contamination to the damage of a lower riparian owner. That objection is lodged to all of this testimony so far as it bears upon that point.

171 And thereupon Defendant, City of Harrisonville, rested its case.

Plaintiff's Rebuttal Testimony.

Plaintiff offered in evidence a certificate of Plaintiff's incorporation under the laws of the State of Delaware dated June 30, 1925, and an amended copy of incorporation of plaintiff under the laws of said state dated July 6, 1925, and the same were received.

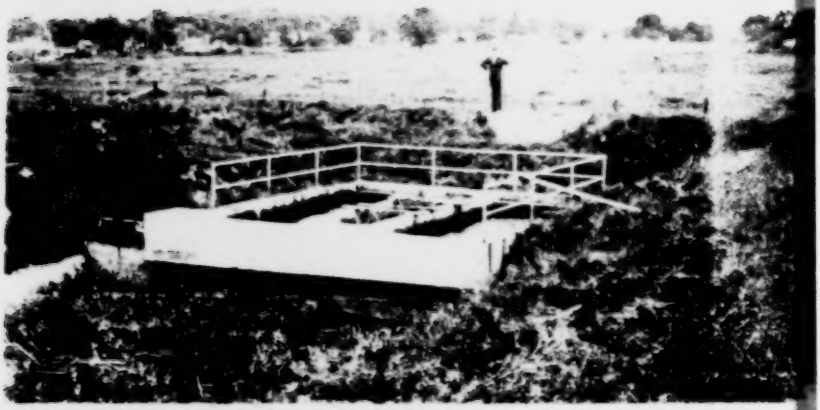
This completed the trial of the case and except for the Exhibits hereinafter referred to constitutes all of the evidence submitted in the trial. All witnesses were duly sworn. All of the Exhibits heretofore set out and all of the Exhibits hereto attached, to-wit: Plaintiff's Exhibit 1 and Exhibits 8 to 14 inclusive and Exhibits 15 to 22 inclusive, and Defendants Exhibits B. and E. and F. and I. and J., were offered and received in evidence, with the exception of Defendants' Exhibit H.

Exhibits 3 to 7 inclusive and Exhibits K, L and M, were physical exhibits which were repossessed by the respective parties upon the close of the trial.

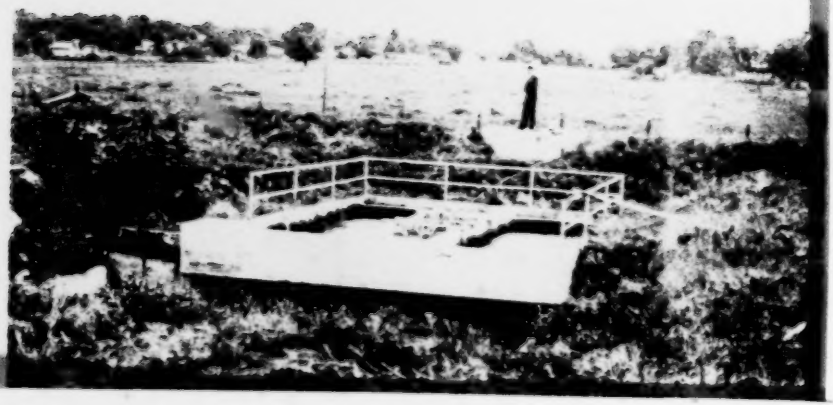
172 At the close of the testimony of the witness, Leslie A. Bruce, Mr. Hazard offered in evidence plaintiff's Exhibit 1, previously marked by the reporter and identified by the witness W. S. Dickey as a correct plat of the farm in question showing the right-of-way of the Missouri Pacific Railroad, said Exhibit 1 being hereto attached as follows:

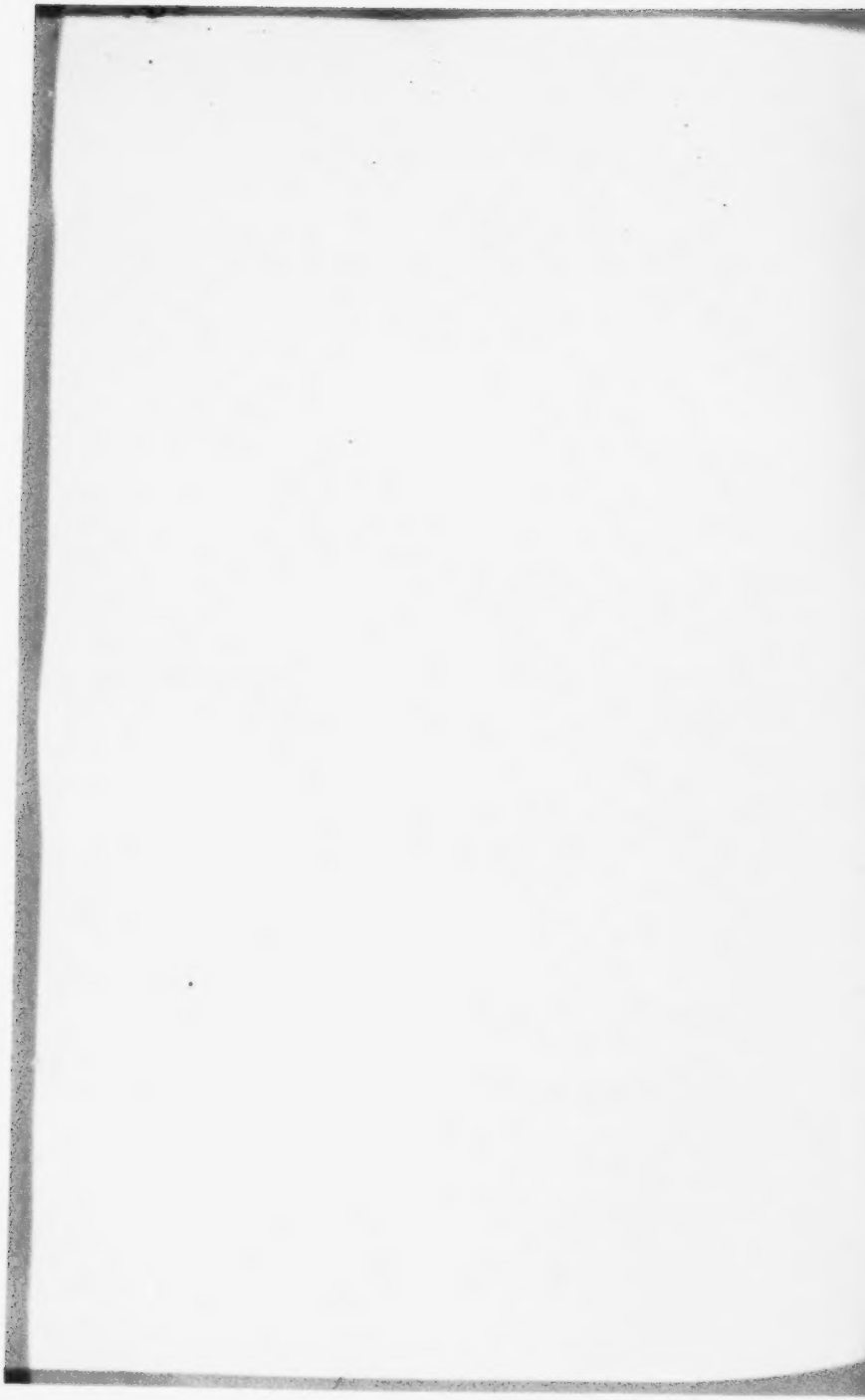
173a At the close of the direct examination of the witness, E. B. Black, Mr. Hazard, for the plaintiff, offered in evidence Exhibits 3 to 14 inclusive. Exhibits 3 to 7, inclusive, were physical exhibits, namely bottles of water identified by the witness Black and repossessed by plaintiff at the close of the trial. Exhibits 8 to 14, inclusive, were pictures of the Imhoff tank identified as such by the witness Black, said exhibits 8 to 14 inclusive are hereto attached as follows:

Plaintiff's Exhibit 8.

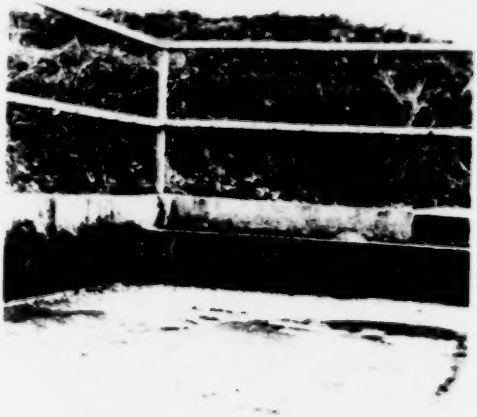


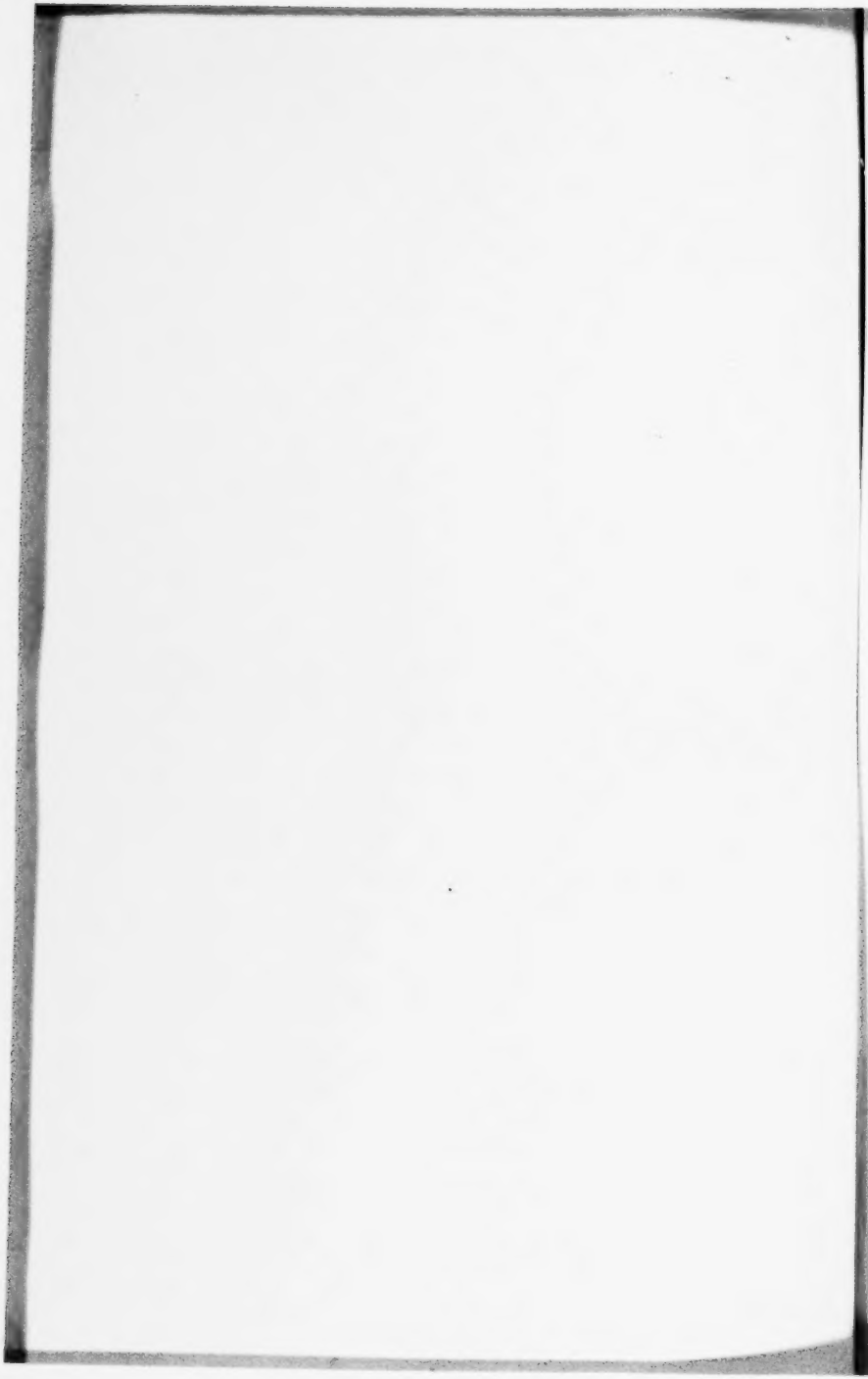
Plaintiff's Exhibit 9.



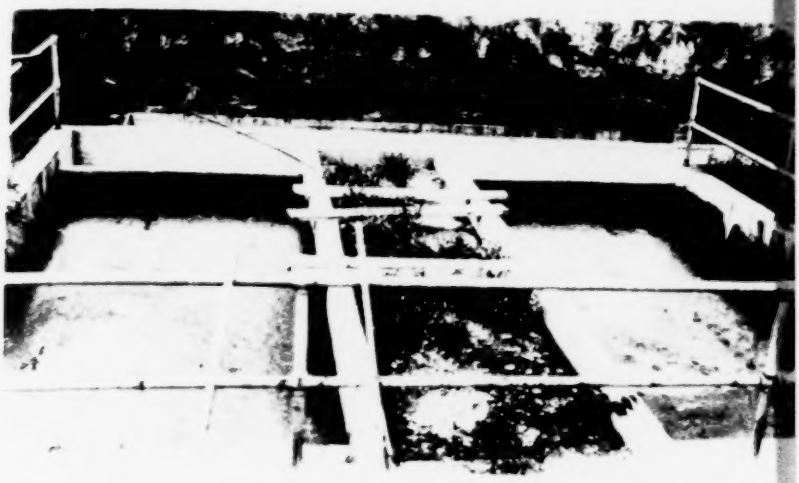


Plaintiff's Exhibit 11.



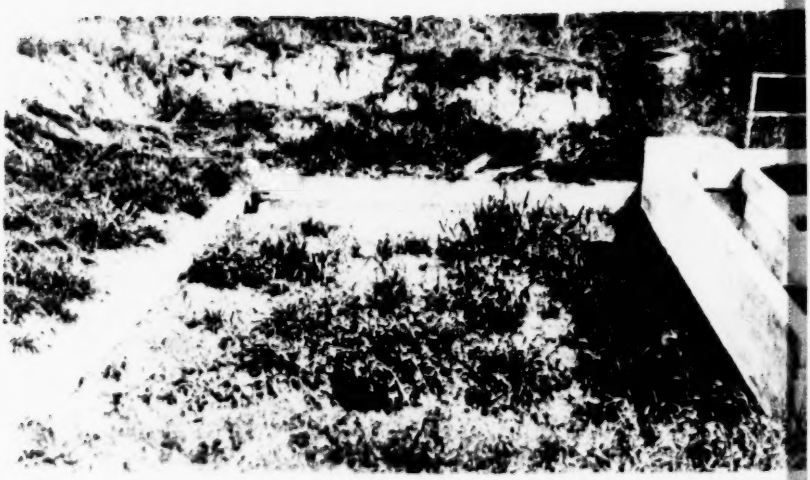


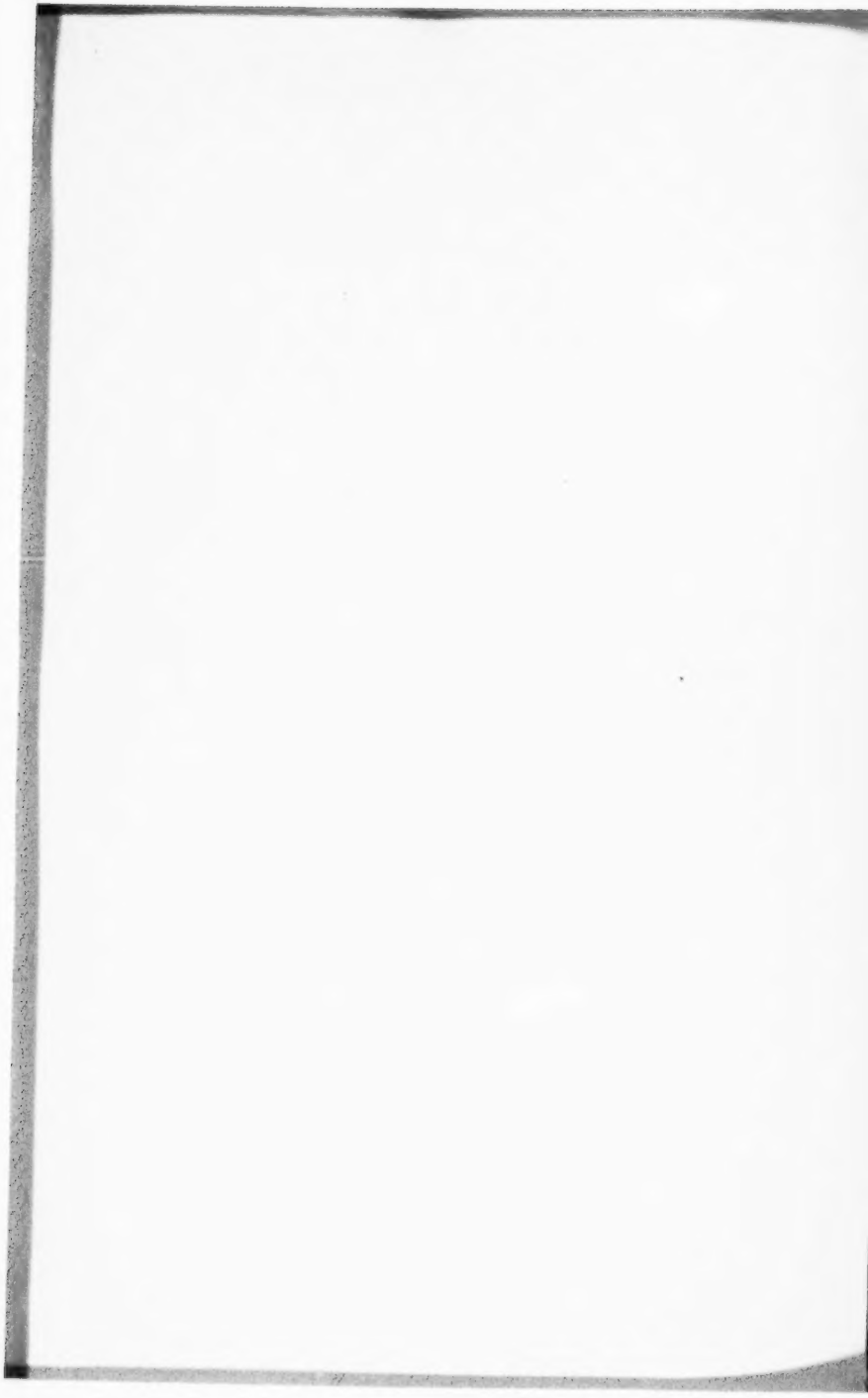
Plaintiff's Exhibit 12.



Plaintiff's Exhibit 13.

Plaintiff's Exhibit 14.





178 At the close of the evidence Mr. Hazard, for the plaintiff, offered in evidence plaintiff's Exhibits 15 to 22 inclusive, previously marked for identification by the reporter and identified by the witness, Joseph G. Hawthorne, as chemical reports made for plaintiff of samples of water taken from the creek at various locations, said exhibits being hereto attached as follows:

179 Plaintiff's Exhibit #15

BLF

Kansas City Testing Laboratory, (Inc.)
Kansas City, Missouri

Telephones Main 1327
Victor 1328

Office and Laboratory
700 Baltimore

Report of Analysis

For Black & Veatch

Date August 14, 1929 Laboratory No. 124,136

Sample Marked Water from creek, 20 ft. above sewer, Harrisonville, Missouri

August 11, 1929

Analysis:

	Parts per million	Grains per U. S. Gallon
Total solids	399.0 ppm	23.33 grains
Loss of ignition of total solids	93.0 "	5.43 "
Oxygen consumed	10.4 "	0.61 "

Remarks:

Respectfully Submitted,
KANSAS CITY TESTING LABORATORY,
By J. G. Hawthorne.

---

180 Plaintiff's Exhibit #16

BLF

Kansas City Testing Laboratory, (Inc.)
Kansas City, Missouri

Telephones Main 1327
Victor 1328

Office and Laboratory
700 Baltimore

Report of Analysis

For Black & Veatch

Date August 13, 1929 Laboratory No. 124,137

Sample Marked Water from creek 60 feet below sewer outlet, Harrisonville, Mo.

August 11, 1929

Analysis:

	Parts per million	Grains per U. S. Gallon
Total solids	497.0 ppm	29.06 grains
Loss on ignition of total solids	160.0 "	9.35 "
Oxygen consumed	17.0 "	0.99 "

Remarks:

Respectfully Submitted,

KANSAS CITY TESTING LABORATORY,
By J. G. Hawthorne.

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181 Plaintiff's Exhibit #17
BLF

Kansas City Testing Laboratory, (Inc.)
Kansas City, Missouri

Telephones Main 1327
Victor 1328

Office and Laboratory
700 Baltimore

Report of Analysis

For Black & Veatch
Mutual Building, Kansas City, Missouri

Date August 21, 1929 Laboratory No. 124,340

Sample Marked Water taken from creek 20 ft. above sewer outlet from Harrisonville Missouri, Imhoff tank, August 18, 1929 by E. B. Black

Analysis:

	Parts per million
Total solids	438.0
Loss on ignition of total solids	74.0
Oxygen Consumed	2.5

Remarks:

Respectfully Submitted,

KANSAS CITY TESTING
LABORATORY,
By J. G. Hawthorne.

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182 Plaintiff's Exhibit #18
BLF

Kansas City Testing Laboratory, (Inc.)
Kansas City, Missouri

Telephones Main 1327
Victor 1328

Office and Laboratory
700 Baltimore

Report of Analysis

For Black & Veatch
Mutual Building City

Date August 21, 1929 Laboratory No. 124,341

Sample Marked Water taken from creek 60 ft. below sewer outlet from Harrisonville, Mo. Imhoff tank, August 18, 1929 by E. B. Black

Analysis:

	Parts per million
Total solids	540.0
Loss on ignition of total solids	204.0
Oxygen consumed	38.5

Remarks:

Respectfully Submitted,

KANSAS CITY TESTING
LABORATORY,
By J. G. Hawthorne.

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183 Plaintiff's Exhibit #19
BLF

Kansas City Testing Laboratory, (Inc.)
Kansas City, Missouri

Telephones Main 1327
Victor 1328

Office and Laboratory
700 Baltimore

Report of Analysis

For Black & Veatch

Date October 2, 1929 Laboratory No. 126,058

Sample Marked Water sample collected by E. B. Black September 26, 1929 from stream 40 ft. above outlet sewer from Imhoff tank.

Analysis:

	Parts per million
Total solids	494.0
Loss on ignition of total solids	85.0
Oxygen consumed	42.0

Remarks:

Respectfully Submitted,

KANSAS CITY TESTING LABORATORY,
By J. G. Hawthorne.

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184 Plaintiff's Exhibit #20
BLF

Kansas City Testing Laboratory, (Inc.)
Kansas City, Missouri

Telephones Main 1327
Victor 1328

Office and Laboratory
700 Baltimore

Report of Analysis

For Black & Veatch
Mutual Building, City

Date October 2, 1929 Laboratory No. 126,059

Sample Marked Water sample collected by E. B. Black September 26, 1929 from stream 60 ft. below sewer from Imhoff tank.

Analysis:

	Parts per million
Total solids	598.0
Loss on ignition of total solids	210.0
Oxygen consumed	65.0

Remarks:

Respectfully Submitted,

KANSAS CITY TESTING LABORATORY,
By J. G. Hawthorne.

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185 Plaintiff's Exhibit #21
BLF

Kansas City Testing Laboratory, (Inc.)
Kansas City, Missouri

Telephones Main 1327
Victor 1328

Office and Laboratory
700 Baltimore

Report of Analysis

For Black & Veatch

Date May 5, 1930 Laboratory No. 133,240

Sample Marked Water from stream Harrisonville, Mo. 60 ft. below outfall sewer from sewage disposal plant, collected 5:25 PM 5/4/30 by E. B. Black.

Analysis:

	Parts per million	Grains per U. S. Gallon
Total solids	7.30 ppm	42.69 gr
Loss on ignition	266.0 "	15.55 "
Oxygen consumed	58.8 "	3.44 "

Remarks:

Respectfully Submitted,

KANSAS CITY TESTING LABORATORY,
By .....

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186 Plaintiff's Exhibit #22
BLF

Kansas City Testing Laboratory, (Inc.)
Kansas City, Missouri

Telephones Main 1327
Victor 1328

Office and Laboratory
700 Baltimore

Report of Analysis

For Black & Veatch

Date May 5, 1930 Laboratory No. 133,241

Sample Marked Water from stream, Harrisonville, Mo. 100 ft. above outfall sewer from sewage disposal plant, collected 5:18 PM 5/4/~~31~~ by E. B. Black

Analysis:

	Parts per million	Grains per U. S. Gallon
Total solids	594.0 ppm	34.74 gr.
Loss on ignition	163.0 "	9.53 "
Oxygen consumed	17.6 "	1.02 "

Remarks:

Respectfully Submitted,

KANSAS CITY TESTING LABORATORY,
By J. G. Hawthorne.

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187 During the course of the direct examination of the witness, W. B. Rollins, Mr. Barnett, for the defendant, offered in evidence defendants' Exhibit B, previously marked by the reporter and identified by the witness, page one, as a map of Harrisonville, showing the arrangements of the sewer system, page two, as a plan of the disposal plant and page three, as a section of the main part of the Imhoff tank. Said Exhibit B is hereto attached as follows:

FOLDOUT(S) IS/ARE TOO LARGE TO BE FILMED

191 During the course of the direct examination of the witness, John R. James, Mr. Barnett, for the defendant, offered in evidence Exhibits E and F, previously marked by the reporter and identified by the witness. Exhibit E as a picture taken over the outlet of the sewer and Exhibit F as a picture taken above the stream from the outlet.

194 At the close of the evidence Mr. Barnett, for defendant, among other exhibits offered in evidence defendants' Exhibits I and J. I having been previously identified by the witness, Hawthorne, as an analysis of certain samples of water brought to the witness on June 4, 1929, said exhibit being hereto attached.

Defendant's Exhibit "I".

"Kansas City Testing Laboratory, (Inc.)

Kansas City, Missouri.

Telephone Main 1327
Victor 1328.

Office and Laboratory
700 Baltimore.

Report of Analysis.

For Cleary & Barnett,

1118 Scarritt Building, Kansas City, Missouri.

Date June 12, 1929 Laboratory No. 121575 -6-7-8-9- 80

Sample Marked Water.

Analysis:

Lab. No.	Mark	Suspended Solids (parts per million	Dissolved Solids (parts per million)	Chlorides parts per Million	Nitrites
121575	"A"	147.6	336.0	16.0	Small amount
121576	"B"	263.2	524.0	34.0	Large amount
121577	"C"	113.9	370.0	14.0	Small amount
121578	"D"	116.5	404.0	12.0	Small amount
121579	"E"	125.4	436.0	18.0	Moderate amount
121580	"F"	125.0	472.0	16.0	Large amount

Remarks:

Respectfully submitted,

KANSAS CITY TESTING
LABORATORY,
By J. G. Hawthorne."

The following is a summary of the contents of Exhibit J consisting of pages 1 to 5 inclusive and identified by the witness, Hawthorne, as a correct analysis of water left with him in September.

Summary of Exhibit J

	Distance from outlet	Total solids (parts per million)	Chlorides (parts per million)	Free Ammonia (parts per million)	Albuminoid Ammonia (parts per million)	Oxygen Consumed (parts per million
1.	95 ft below	520.00	50.00	0.10	0.30	35.00
2.	190 ft below	520.00	44.00	0.05	0.18	38.00
3.	30 ft below	660.00	70.00	2.50	1.00	73.00
4.	95 ft below	582.00	68.00	3.00	0.80	73.00
5.	230 ft below	490.00	48.00	3.10	1.00	40.00
6.	560 ft below					

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195 (Approval of Statement of Evidence by District Judge.)

It is hereby certified that defendant, City of Harrisonville, Missouri, appellant from the decree of this court did on the 10th day of November, 1930, in due form lodge with the clerk of this court its narrative statement of the proceedings had and of the evidence offered upon the trial of the case consisting of some 96 typewritten pages; that thereafter at the request of plaintiff in this cause, appellee in this appeal, the said plaintiff and the said defendant, City of Harrisonville, Missouri, prepared the foregoing as a substitute statement of the proceedings had and of the evidence offered upon the trial of the case, substantially all of the verbatim report of the evidence and proceedings included therein being included at the request of the plaintiff and appellee and all of such passages being included by direction of the court; that the court has granted leave to the appellant and appellee upon their joint request to substitute herein the foregoing statement of the proceedings had and of the evidence offered upon the trial of the case for that statement thereof heretofore lodged in this court by the appellant on said 10th day of November, 1930. The court further certifies that the foregoing statement of the proceedings had and of the evidence offered upon the trial of the case is a true, complete and properly prepared statement of such proceedings and such evidence.

ALBERT L. REEVES,
Judge of the District Court of the Western Division of the Western District of Missouri.

(Stipulation of Counsel Approving Statement of Evidence.)

It is hereby stipulated between the plaintiff and appellee, W. S. Dickey Clay Manufacturing Company, and defendant and appellant, City of Harrisonville, Missouri, that the foregoing statement of the proceedings had and of the evidence offered upon the trial of the case was prepared by the parties hereto jointly at the request of plaintiff and appellee as a substitute for a statement of the proceedings had and
196 of the evidence offered upon the trial of the case heretofore lodged in narrative form by appellant with the clerk of this court on the 10th day of November, 1930, and that substantially all of the verbatim report of such proceedings and evidence which is included herein is thus included at the request of said plaintiff and appellee, and that the appellant and appellee submit the foregoing statement of the proceedings had and of the evidence offered upon the trial of the case as a substitute for the said statement formerly lodged herein by the appellant and request that it be thus submitted by the court and that it be approved by the court as a true, complete and properly prepared statement of the proceedings had and of the evidence offered upon the trial of the case, and further agree that such delays as have occurred in the preparation and submission of the foregoing statement have been by mutual consent and by the agreement of appellee to waive any objections on its part on account of such delay.

WINGER, REEDER, BARKER,
GUMBINER & HAZARD,
Attorneys for Plaintiff and Appellee
W. S. Dickey Clay Manufacturing Co.

RAYMOND G. BARNETT,
Attorney for defendant and appellant City of Harrisonville, Missouri.

Filed in the United States District Court June 15, 1931.

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197 Bond on Appeal.

Know All Men by these presents that we, City of Harrisonville, Missouri, as principal and American Surety Company of New York as [securities], of the County of Cass, State of Missouri, are held and firmly bound unto W. S. Dickey Clay Manufacturing Company in the sum of $5,000.00, lawful money of the United States to be paid to it and its successors and assigns; to which payment well and truly to be made we

bind ourselves and each of us jointly and severally, and each of our heirs, executors and administrators by these presents.

Sealed with our seals and dated this 15th day of April, 1931.

Whereas, the above named City of Harrisonville, Missouri, has prosecuted an appeal to the Circuit Court of Appeals of the United States Eighth Circuit, to reverse the judgment and decree of the District Court for the Western District of Missouri, in the above entitled cause.

Now, therefore, the condition of this obligation is such that if the above named City of Harrisonville, Missouri, shall prosecute its said Appeal to effect and answer all costs and damages if it fail to make good its plea then this obligation shall be void; otherwise to remain in full force and effect.

CITY OF HARRISONVILLE,
By Lee Spicer, Mayor.

Attest: C. V. Lynch
City Clerk.

AMERICAN SURETY COMPANY
OF NEW YORK,
(Seal) By W. R. Evans
(W. R. Evans) Resident Vice President

Attest: Vivian Estes. (Seal)
(Vivian Estes) Resident Asst. Sec'y.

Bond #413152-D

Approved this June 15, 1931.

ALBERT L. REEVES,
District Judge.

Filed in the United States District Court June 15, 1931.

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198 Supplemental Praecipe for Transcript.

To the Clerk of the Above Entitled Court:

In view of the filings herein and of the orders of this court herein made since the filing of our original praecipe herein on the 14th day of November, 1930, in preparing for the purposes of appeal in the above entitled cause a transcript of the record therein, you will please include in addition to the documents called for in said original praecipe the following documents together with the filing marks thereon.

1. An order entered by this court November 6, 1930, enlarging the time for docketing the appeal to December 31, 1930.

2. A stipulation between the parties filed November 29, 1930.

3. An order enlarging the time of appellee to add to the narrative statement of the evidence filed November 29, 1930.

4. A stipulation between the parties filed December 19, 1930.

5. An order entered December 29, 1930, enlarging the time for docketing the appeal to February 1, 1931.

6. An order entered January 28, 1931, enlarging the time for docketing the appeal to March 1, 1931.

7. An order entered February 25, 1931, enlarging the time for docketing the appeal to April 1, 1931.

8. An order entered March 28, 1931, enlarging the time for docketing the appeal to May 1, 1931.

9. An order entered April 24, 1931, enlarging the time for docketing the appeal to June 1, 1931.

10. An order entered May 27, 1931, enlarging the time for docketing the appeal to July 1, 1931.

199 11. The statement of the proceedings had and of the evidence offered upon the trial of the case. This is really the same item designated in item 13 of the original praecipe except that this covers the substituted statement of the proceedings had and of the evidence offered upon the trial of the case, doing away with the necessity of incorporating in the transcript the original statement lodged herein with the clerk on November 10, 1930, of the proceedings had and of the evidence offered upon the trial of the case, in setting out this statement of the proceedings had and of the evidence offered upon the trial of the case please include not only the court's certificate at the end thereof but the stipulation between the parties immediately following that certificate.

12. The stipulation between the parties filed June 15th, 1931, concerning this praecipe and certain other matters.

13. The appeal bond for $5,000.00 filed herein and approved by the court June 15th, 1931.

14. A copy of this supplemental praecipe.

RAYMOND G. BARNETT,
ALLEN B. GLENN,
Attorneys for City of Harrisonville, Missouri, defendant herein and appellant on appeal.

Received a copy of the above supplemental praecipe this 15th day of June, 1931, and consent given to the filing of the same.

WINGER, REEDER, BARKER,
GUMBINER & HAZARD,
Attorneys for W. S. Dickey Clay Manufacturing Co., plaintiff herein, and appellee on appeal.

Filed in the United States District Court June 15, 1931.

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200 (Order, June 29, 1931, Further Extending Time to File Transcript.)

Now for good cause shown the time for docketing the appeal herein and filing the record of this cause in the Circuit Court of Appeals of the United States, Eighth Circuit, is enlarged to permit the appellant herein to docket said cause and file such record with the clerk of said Circuit Court of Appeals of the United States, Eighth Circuit, on or before the 1st day of August, 1931.

ALBERT L. REEVES,
United States District Judge for the Western District of Missouri.

The above order consented to.

WINGER, REEDER, BARKER,
GUMBINER & HAZARD,
Attorneys for Plaintiff.

Filed in the United States District Court June 29, 1931.

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201 (Opinion of District Court.)

This is an action to abate or enjoin an alleged nuisance.

Plaintiff is a Delaware Corporation and is the owner of a body of land situated in close proximity to the defendant municipal corporation, The City of Harrisonville, Missouri. Such land is used for pasturage purposes and has been improved by the construction of barns, silos, et cetera, at an expense of $25,000 to $30,000. There is maintained on said premises a herd of Hereford cattle. Many of these have been registered. The entire herd has a value of approximately $20,000.

There is a stream of water whose channel runs through plaintiff's land, known as Town Creek, which flows intermittently, depending upon seasonal conditions. This stream has its origin in the environs of the defendant city. Such stream has been used for a number of years as water for the live stock on said premises.

The City of Harrisonville is a municipal corporation belonging to the Fourth Class, according to Missouri statutes. In the year 1923 said city completed the construction of a sewage system and sewage disposal plant. This involved the usual construction of sewers in the city leading to a main sewer where the sewage was collected and caused to flow into a disposal tank known as an Imhoff tank.

This is a structure scientifically designed for the purpose of reducing waste by dissolving and oxidizing raw sewage. It was designed and used in the interests of the public health. Said Imhoff tank was situated beyond the corporate limits of the city and a short distance from Town Creek. Said
202 tank was so equipped that the effluent therefrom would flow through a drain under the right of way of the defendant railroad company into Town Creek. This outlet for said effluent was but a short distance from plaintiff's land and flowed thereon.

It is alleged in the bill, in substance, that the waters of Town Creek were suitable for consumption as drinking water by live stock prior to the construction of said sewage system, but that the effluent from said Imhoff tank has so polluted and contaminated the waters thereof as to render it unfit for such use. Moreover, it is charged that offensive odors arise from putrescent raw sewage which is discharged into Town Creek. It is alleged, of course, that such sewage is carried by said stream over and across plaintiff's land and

that the odors therefrom are pervasive and diffusive for a long distance. As a result of such contamination and odors plaintiff says it suffers continual damages in the reasonable rental value of its property.

Plaintiff specifically alleges that such nuisance is temporary and that in the exercise of care and by the construction, maintenance and operation of an efficient disposal plant the pollution and contamination of said stream could be avoided and the offensive odors abated.

Plaintiff seeks an injunction only upon condition that the defendant city shall now fail or neglect to perfect its disposal plant.

The defendant railroad company by a separate answer pleads its compliance with sections of the Missouri statute which require it to permit the construction of sewers under its right of way for cities belonging to the class of
203 Harrisonville. It specially pleads Section 8787 R. S. Mo. 1919. It denies any knowledge of the claimed damages of plaintiff.

The defendant city denies the pollution or contamination of Town Creek and asserts the efficient operation of its sewage disposal plant.

The evidence on the part of the plaintiff tended to show that plaintiff acquired the real estate in question in July, 1925; that then the waters of Town Creek were polluted and contaminated and that conditions have grown worse until the present time; that much raw sewage of a putrescible nature is discharged into Town Creek and same is distributed in pools and along the shores of plaintiff's land; that cattle refuse to drink the water of Town Creek and that it affects them adversely where it comes in contact with their limbs and bodies, that is to say it causes a shedding of hair and otherwise causes the cattle to present a rough and, as the court infers, an unsightly appearance.

There was evidence from which the deduction might be made that sickness resulted to the cattle by reason of their contact with the polluted waters of Town Creek. Such pollution was carried for a considerable distance below the lands of plaintiff where other riparian owners also experienced annoyances.

Plaintiff's evidence further showed that the odors upon the stream were observable for a distance of approximately three-quarters of a mile and that the rental value of said

land for pasturage purposes was reduced from a maximum of $7.50 per year per acre to $3.17 per acre.

The testimony on behalf of the defendant city tended to show that the waters of Town Creek were not rendered unfit for consumption by animals and that the odors were
204 only such as would naturally arise from any kind of a disposal plant and that same were not ordinarily observable.

Defendants' testimony further tended to show that the rental value of said land was not more than $3 to $3.50 per acre and that Town Creek was more or less polluted and contaminated by the natural drainage of the City of Harrisonville before the installation of its sewage system.

Other facts will be stated as they become pertinent in the course of this memorandum opinion.

1. This being a serious conflict of important rights between the city and an individual, a corporation, the law applicate to the rights of each should be stated. That the city, as in the case of an individual, enjoys its riparian rights upon the shores of Town Creek cannot be successfully questioned or challenged. By this right the city can permit its drainage to flow naturally into said stream and cannot be held accountable for pollution and contamination that may result.

As a proprietor on the upper courses of the stream it cannot be denied its right of natural and inevitable use, nor can it be questioned but that the city, obedient to modern demands in the interest of public health, may construct a sewage system and, if necessity requires, cause its collected sewage to flow into Town Creek. The plaintiff as a proprietor below the said city, has the right to the use of said stream free of unnecessary contamination and pollution. If pollution and contamination become necessary in the disposal of the city's sewage, then plaintiff's remedy would be for a permanent nuisance and the defendant city would have to respond as in the case of an exercise of of the right of eminent domain.

205 2. In the case at bar the first question to be resolved is whether the city of necessity discharges its sewage into Town Creek. If so, then the case of City of Cape Girardeau vs. Hunze, 314 Mo. 438, and the case of Smith vs. Sedalia, 244 Mo. 107, would apply and plaintiff's remedy would be for damages and not for injunctive relief.

On the other hand if the defendant city can dispose of its sewage efficiently so as to preserve said stream from contamination then it has no right to contaminate and pollute the stream to the injury of the plaintiff. 9 R. C. L. Section 86.

In the case of Mining Co. vs. City of Joplin, 124 Mo. 129, the court correctly stated the law as follows:

"But a city has no right to gather its sewage together and cast it into a stream so as to injure the lower proprietor. For damages thus sustained, the lower proprietor will have an action, and in many instances injunctive relief."

In Edmondson et al vs. City of Moberly, 98 Mo. 523, the court covered the question of "necessary result" of a sewage system as follows:

"The power itself must be regarded as subject to the just limitation forbidding its exercise in such manner as to create a nuisance injurious to private rights of property where such a consequence is not a necessary result of exerting the power."

The evidence shows that the city in an effort to dispose of its sewage constructed an Imhoff tank. Admittedly, this structure can only dispose of approximately sixty per cent of the raw sewage turned into it. Concededly forty per cent was carried without treatment and discharged into
206 Town Creek. It further appears that said Imhoff tank was not efficiently operated so that the maximum benefits could be realized. The court finds from the evidence that the sewage after passing through the Imhoff tank, as a primary disposal plant, could without great expense be further treated in a secondary plant and that by such treatment the sewage of the city could be reduced or disposed of to a maximum of ninety per cent. This would reduce the sewage for practical purposes and would have the effect to abate the nuisance.

The court finds upon the evidence that the city could dispose of its sewage. This was recognized when the Imhoff tank was constructed. An engineer for the state health authorities testified that the Harrisonville sewage system is inadequate and that said city was ineffectively disposing of its sewage. Other cities, according to the testimony, similarly situated and belonging to the same class, effectively dispose of their sewage. Witnesses who resided near to or on plaintiff's land, and others who had business thereon testified in support of plaintiff's allegations.

3. The court finds from the evidence therefore that the effluent from the defendant city's sewage system pollutes and contaminates Town Creek. Whether it renders the waters wholly unfit for consumption as drinking water need not be decided. According to the overwhelming evidence, the stream was filthy and such filth adhered to the limbs and bodies of plaintiff's cattle and the odors arising were not only noticeable but extremely offensive.

The plaintiff has a right to enjoy its premises freed of these needless annoyances. It was within the power of the city, according to the evidence, to abate the nuisance.
207 This is true notwithstanding the evidence of a degree of pollution on the upper reaches of Town Creek and above the outlet of the sewer. According to the evidence the stream had some power of self purification as it flowed. Prior to the construction of the sewage system the stream was available for use and did not give off noxious and offensive odors. The court finds that the nuisance in question is not only temporary but easy of abatement.

4. Plaintiff's evidence was not controverted that it cost $3500. to remove the pollution already in Town Creek on its property. The evidence varied as to the rental value of property of the character of plaintiff's. The witnesses said that it would run from $3 up to $7.50. Plaintiff now receives $3.17 per acre.

An adjoining proprietor whose land was affected by the pollution, but not as extensively as plaintiff's property, receives $4 per acre for his land for agricultural purposes. The opinion was expressed that plaintiff's land was more desirable. The rental on said adjoining land had been until recently $5 per acre.

The court finds from all the evidence that approximately 100 acres of plaintiff's land is seriously affected by the pollution and contamination of Town Creek. The rental value was reduced $1.50 to $2 per acre. The plaintiff has owned said land for a period of five years. Its suit was filed in July 1928. Its damages therefore would aggregate approximately $500. This sum, with the cost of removing the nuisance, would amount to $4000. Plaintiff is entitled to a decree restraining the nuisance and to a money judgment in said sum. However, a final injunction will not be immediately granted. The defendant city should have a reasonable time in the interest of the health of the community to
208 reconstruct or repair its sewage system. This is proper procedure. 9 R. C. L. Sec. 87 P. 694.

The court will make no order as to what the city should do to solve its problem except that something must be done within a reasonable time. Unless, therefore, the city shall within a period of six months dispose of its sewage other than by discharging its raw sewage into Town Creek, a final injunction will be granted.

Counsel for the city argue its financial inability to bring about an effective disposal of its sewage. The Missouri Statutes appear to confer upon the authorities of the city a wide laditude in providing for emergencies of this kind. The city in the exercise of its function should be anxious to avoid disposing of its sewage in such way as to occasion needless harm and injury to the people who hold property in its environs.

The defendant railroad company is guilty of no wrong in connection with the defendant city's sewage system. It was bound to permit the construction of a sewer under its right of way. However, in the event that the city should decline to dispose of its sewage otherwise, then an injunction should be awarded against the railroad company to prohibit it from allowing the use of its right of way for the perpetration of a wrong.

Kansas City, Missouri, June 30, 1930.

ALBERT L. REEVES,
United States District Judge.

Filed in the United States District Court, June 30, 1930.

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209 (Clerk's Certificate to Transcript.)

United States of America—Set:

I, Edwin R. Durham, Clerk of the District Court of the United States for the Western District of Missouri, do hereby certify that the foregoing is a full, true and complete transcript of the record and proceedings, as called for in the praecipes filed herein and made a part hereof, in the cause wherein W. S. Dickey Clay Manufacturing Company is plaintiff and City of Harrisonville, Missouri, a Municipal Corporation, and Missouri Pacific Railroad Company, a corporation, are defendants, as fully as the same appears on file and of record in my office.

I further certify that the original Citation is prefixed hereto and returned herewith.

Witness my hand as clerk and the seal of said court. Done at office in Kansas City, Missouri, this 30th day of June, A. D., 1931.

Seal
U. S. Dist. Court
Western Division
Western District
of Missouri.

EDWIN R. DURHAM,
Clerk U. S. District Court.
By H. C. Spaulding,
Deputy Clerk.

Filed Jun. 30, 1931. E. E. Koch, Clerk.

184 And thereafter the following proceedings were had in said cause in the Circuit Court of Appeals, viz:

(Appearance of Counsel for Appellant.)

United States Circuit Court of Appeals,
Eighth Circuit.

City of Harrisonville, Missouri, Appellant,
No. 9241 vs.
W. S. Dickey Clay Manufacturing Company.

The Clerk will enter my appearance as Counsel for the Appellant.

RAYMOND G. BARNETT,
Scarritt Bldg.,
Kansas City, Mo.

ALLEN B. GLENN,
Harrisonville, Mo.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Jul. 17, 1931.

(Appearance of Counsel for Appellee.)

The Clerk will enter my appearance as Counsel for the Appellee.

LELAND HAZARD.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Jul. 3, 1931.

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185 (Order of Argument.)

November Term, 1931.

Tuesday, November 24, 1931.

This cause having been called for hearing in its regular order, argument was commenced by Mr. Raymond G. Barnett for appellant, and the hour for adjournment having arrived further argument was postponed until tomorrow morning.

(Order of Submission.)

November Term, 1931.

Wednesday, November 24, 1931.

This cause having been called for further hearing, argument was resumed by Mr. Raymond G. Barnett for appellant,

continued by Mr. Leland Hazard for appellee and concluded by Mr. Raymond G. Barnett for appellant.

Thereupon, this cause was submitted to the Court on the transcript of the record from said District Court and the briefs of counsel filed herein.

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186 (Opinion.)

United States Circuit Court of Appeals,
Eighth Circuit.

No. 9241.—MAY TERM, A. D. 1932.

City of Harrisonville, Missouri, Appellant,
vs.
W. S. Dickey Clay Manufacturing Company, Appellee.

Appeal from the District Court of the United States for the Western District of Missouri.

Mr. Raymond G. Barnett (Mr. Allen B. Glenn was with him on the brief), for appellant.

Mr. Leland Hazard (Mr. Maurice H. Winger and Mr. George J. Winger were with him on the brief), for appellee.

Before STONE and KENYON, Circuit Judges, and CANT, District Judge.

CANT, District Judge, delivered the opinion of the court.

The parties will be designated as in the court below, where W. S. Dickey Clay Manufacturing Company was plaintiff, and City of Harrisonville was defendant.

Plaintiff is a corporation organized under the laws of the State of Delaware. Defendant is now, and for several years last past has been, a city of about two thousand inhabitants in the State of Missouri. A small stream, known as Town Creek, flows through or near the Northerly line of said City and takes its course Westerly

and Southerly near the Westerly line thereof. During some periods, this stream is nearly, or quite dry. Prior to the year 1923, said City had no general sewer system. During said year such a system was installed. Thereby, the sewage of the City was collected and was conveyed for treatment to an Imhoff Tank, so-called, which was located near the westerly boundary of said City and closely adjacent to the stream above referred to. For some years past, plaintiff has been the owner of a considerable tract of land lying along the said Creek, and, in the main, down stream from said Tank. Said land has been, and is, used for pasturage purposes. Said tank is, and has been, only about 60% efficient in removing offensive matter from the sewage which is conducted thereto, and the effluent from the tank therefore carries about 40% of the putrescent matter originally in such sewage. Such effluent is discharged into said Town Creek and is carried by said Creek through and alongside of plaintiff's land. The sewage, so discharged into said Creek, fouls the waters of the stream and the banks thereof and offensive odors constantly arise from such waters and from the foul substances which are deposited along said bank. The introduction of such sewage into said creek renders the waters thereof unfit for drinking by the cattle which are pastured on the land referred to. By the installation of a supplementary tank, the sewage disposal system of said defendant may be so improved that the effluent therefrom would be comparatively harmless and inoffensive.

This suit was brought to obtain injunctive relief against the maintenance of the sewer system and Imhoff tank in their present imperfect state and for damages. Defendant admits that the matters complained of constitute a nuisance, but asserts that the same is permanent in its character, that the court is without power to abate the same, and that plaintiff's only remedy is an action for damages to its land on the theory that present conditions will continue indefinitely in the future. Defendant also claims that its financial condition is such that it can not install the supplementary system, which is contemplated by the decision of the trial court. It claims also, and specifically, that the award hereinafter mentioned, to plaintiff, of the item of $3500.00, on account of the estimated cost of clearing the creek bed and banks, is unwarranted.

The trial court found that something like one hundred acres of plaintiff's land have been and are injuriously affected by the offensive matter deposited in said stream, that the maintenance of said

plant in the condition in which it has been operated constitutes a temporary nuisance, which may be easily abated, that the rental value of plaintiff's lands has been reduced by said nuisance in the sum of $100.00 per annum for the period of five years immediately preceding the entry of the decree herein, and that it would cost $3500.00 to remove the offensive matter from along the banks of said stream in its course along and through the lands of plaintiff. An injunction was therefore ordered and it was adjudged that plaintiff recover from defendant the sum of $4,000.00, of which $500.00 should be for the diminished rental or usable value of plaintiff's lands throughout the said period of five years, and $3500.00 should be the estimated expense of removing offensive matter from the bed and banks of said creek.

The fact that the sewage system and the Imhoff tank in question were installed pursuant to the direction of the governing body of the City does not place them beyond judicial control. *Carmichael* v. *Texarkana*, 94 Fed. 561, 570-574. Approved in case of same title at 116 Fed. 845, 849, (C. C. A. 8). *Winchell* v. *City of Waukesha*, 110 Wis. 101. *Seifert* v. *City of Brooklyn*, 101 New York 136, 139, et seq., 143 et seq.

A city is not authorized or justified in so collecting and discharging the sewage therefrom as to cause unnecessary injury to private persons. *Carmichael* v. *Texarkana*, 94 Fed. 561; also 116 Fed. 845, 849. (C. C. A. 8.) *Jones* v. *Sewer Improvement District*, 119 Ark. 166; *Morse* v. *City of Worcester*, 139 Mass. 389; *Chapman* v. *City of Rochester*, 110 N. Y. 273; *Winchell* v. *City of Waukesha*, 110 Wis. 101; *Edmondson, et al.* v. *City of Moberly*, 98 Mo. 523.

The nuisance here in question, being such as might be abated by order of court, is temporary in character, *Foncannon* v. *City of Kirksville*, 88 Mo. App. 279, 284; *Pinney* v. *Berry*, 61 Mo. 359, 367; *Ready* v. *Mo. Pac. Ry. Co.*, 98 Mo. App. 467, 470, and plaintiff is entitled to injunctive relief. *Carmichael* v. *Texarkana*, 94 Fed. 561, 571, 573, 574; also 116 Fed. 845, 849, (C. C. A. 8); *Missouri* v. *Illinois and Chicago District*, 180 U. S. 208, and authorities cited at pages 245-247; *Winchell* v. *City of Waukesha*, 110 Wis. 101; *Haskell* v. *New Bedford*, 108 Mass. 208, 216, et seq.

In all cases of nuisance, as well as of other torts, and aside from the right to punitive damages in certain cases, the person sustaining the injury is entitled to recover such sum as will fairly compensate

him for all detriment of every kind which he has suffered and which is traceable proximately to the wrong of which he complains. This detriment or injury may often be of various kinds. He is entitled to be made whole. He is not entitled to any excess or profit. In this respect, whatever is right and just should be done.

In cases of permanent nuisance affecting real estate, the measure of damages usually is the difference between the value of the land which is involved immediately before the imposition of the nuisance and the value of the same land immediately after such imposition, having in mind that the conditions are to remain permanent. *Pinney* v. *Berry*, 61 Mo. 359, 367; *St. Louis Trust Company* v. *Banbrick*, 149 Mo. 560, 569, 570; *Conklin* v. *City of Des Moines*, 184 Iowa, 384, 387; *Foncannon* v. *City of Kirksville*, 88 Mo. App. 279, 284.

In case of a nuisance which is properly classified as permanent, and which affects real estate, if, by the expenditure of money, the property can be restored to substantially the same condition in which it was before the nuisance was imposed, and if the cost of such restoration would be less than the difference in the values of the property before and after it was affected by the nuisance, then, manifestly, since the question is one of compensation, and of putting the owner in as good a position financially as he was before his property suffered from the nuisance, the true measure of damage would be the cost of such restoration. *Seely* v. *Alden*, 61 Pa. St. 302, 306; *Heath* v. *Minneapolis, St. P. & S. Ste. M. Ry. Co.*, 126 Minn. 470.

In cases of temporary nuisance affecting real estate, the rule ordinarily applicable is that the plaintiff is entitled to recover the difference between the rental or usable value of the land as it would be without being subjected to the nuisance, and such value with the lands subject thereto. *Pinney* v. *Berry*, 61 Mo. 359, 367, 368; *Ready* v. *Mo. Pac. Ry. Co.*, 98 Mo. App. 467, 470; *Smith* v. *The Kansas City, etc. Ry. Co.*, 98 Mo. 20, 25.

In some cases the foregoing rule would not afford full compensation. Under some circumstances, a temporary nuisance may cause specific damage to buildings or other property. In such cases, the rule of compensation would often require that such damage be repaired or that offensive objects be removed. This, in addition to the recovery of the rental or usable value of the land, might be the obviously practical, prudent, and economical way of restoring the

owner of such land to his former condition. In some cases where continuing injury is threatened, it might be necessary to incur expense in abating the nuisance. In such cases, the reasonable cost of such repairs, removal, or abatement might properly be recoverable as a part of the damages actually sustained. *Emery* v. *Lowell*, 109 Mass. 197, 201; *Shaw* v. *Cummiskey*, 7 Pick. 76, 78; *Pinney* v. *Berry*, 61 Mo. 354, 367; *Krebs* v. *Construction Co.*, 144 Mo. App. 649, 653; *Toebbe* v. *City of Covington*, 145 Ky. 763, 768, 769; *Watson* v. *Miss. R. P. Co.*, 174 Iowa 23, 38. But in no case should a defendant be required to pay more than just compensation. This must always be the limit of the recovery. Therefore, if for special reasons, the necessary expense of such repairs, removal, or abatement would be out of all proportion to the benefits which would accrue therefrom, such expense should not be incurred and some other and more reasonable basis for estimating the true amount of compensation should be employed.

In some cases of nuisance, both temporary and permanent, certain special features such as the injurious effect of the nuisance upon the health of the plaintiff, or of his family, or the fact that the nuisance may have injured the health, or caused the death of domestic animals, and also other injuries peculiar to the specific case, must sometimes be considered. As already stated, whatever the character of the injury, if the same be traced to the nuisance as the proximate cause, plaintiff is entitled to compensation on account thereof. Unless the deposit of foul matter in the bed of the creek here in question and along the bank thereof is to be spelled out as such a special feature, we have none to deal with in this case. Such deposits, however, is what, in part, constitutes the nuisance here. The cause of such nuisance is the sewer system and the Imhoff tank, which have been referred to, and they may be considered and are a part of the nuisance itself.

The ordinary rules as to the measure of damages apply in this case.

Where, as here, both equitable relief by abatement, and the recovery of damages, are sought in the same action, damages sustained up to the time of the trial may be awarded. *Karns, et al.*, v. *Allen, et al.*, 135 Wis. 48, 59; *Gasse* v. *Development & Funding Co.*, 135 N. Y. S. 732.

It is sometimes difficult to determine whether a nuisance is temporary or permanent in its character. *Toebbe* v. *City of Covington*, 145 Ky. 763, 768, 141 S. W. 421, 423. There are authorities

which hold that under some circumstances the plaintiff has a right to elect as to which class a nuisance shall be assigned. If there were reasonable ground for difference of opinion as to whether the nuisance here in question is temporary or permanent, the court should be slow to hold the same to be permanent, except at the election of plaintiff, because the effect of such holding would be to confirm in defendant, permanently, the benefit of its own unlawful act, and, in effect, would be legalizing the original wrong of which complaint is made. Upon this phase of the case, the trial court was entirely right. In this case, however, with the installation of a supplementary tank, the condition of the creek will tend to correct itself. The effluent from the tank, then much purified, the rainfall from time to time, and the other forces of nature will all combine to restore the creek to substantially the same state in which it was before the construction of the Imhoff tank. Such elements were considered and such view taken in *City of San Antonio* v. *Mackey*, (Texas, 1896), 14 Tex. Civ. App. 210, 214, 36 S. W. 760. In that case the question of the removal of offensive matter was considered, and there being no contention that the cost of such removal would be prohibitive or unreasonable, it was held that such expense was properly chargeable to the wrongdoer. About this, under such circumstances, there could be no serious question.

As will be seen, this does not mean that the cost of removal is the correct measure of damages in all cases which may arise.

A case much more directly in point, both in its bearing upon the character of the nuisance here and upon the proper measure of damages is *Sussex Land & Live Stock Co.* v. *Midwest Refining Co.*, 294 Fed. 597, 604-609, (C. C. A. 8).

Following the case last cited, the allowance to plaintiff of the sum of $500.00 as the diminished rental value or usable value of plaintiff's lands for the five year period last before the entry of the decree was proper. Since the entire harmful effects of the nuisance in this case are reflected in the diminished rental or usable value of the lands, and since plaintiff has the right to bring successive actions if it shall develop that the further or continuing injuries which are threatened to said lands shall actually occur, it well may be that the allowance last above referred to is the limit which may be awarded to plaintiff in this case. Assuming the nuisance to be temporary, as determined by the trial court, the right to bring such separate actions cannot be questioned.

The propriety of allowing the item of $3500.00 as damages under the rather unusual circumstances of this case is more than doubtful. As already noted, the cost of abating a nuisance or of removing material from lands where such material is thereon as the result of trespass or encroachment, whether as the result of nuisance, or otherwise, may sometimes be considered; but for the reasons which will shortly be stated here, it is reasonably clear that this can not be such a case.

It is reasonably clear that in this case, and in various others which may be supposed, the cost of removal, used as a measure of damages, would work a manifest injustice. As already stated, the finding of the trial court is that the total annual damage sustained by plaintiff on account of the nuisance in question is $100.00. If the award of $3500.00 is to stand, plaintiff will be under no obligation to use the same in clearing out the creek and would be most unwise if it should make such use thereof; but it will thereby be provided with a fund, which, at interest rates which are reasonably current, will provide an annual income of $210.00, without abatement of the principal and with the right to bring other suits for damages from time to time in the future as such rights may accrue. The amount of such annual income which may be so realized will be more than twice the amount of the annual damage which up to the time of the trial had been caused by said nuisance to the lands in question. If, by way of illustration, we assume that the expense of clearing out the stream, instead of being $3500.00, would be twice that sum, then, under the rule which has been applied in this case, the amount to be awarded to plaintiff as the estimated cost of abating the nuisance would perhaps be more than the value of all of its lands which are involved here; or if the finding were that the annual damage to plaintiff's lands by reason of the nuisance was the sum of $50.00 only, it would be quite apparent that there must be something wrong in awarding the sum of $3500.00, or in the case supposed, of $7,000.00, as the estimated cost of clearing out the stream and as a real item of damage which the plaintiff had sustained in addition to the loss in the rental value or the usable value of the land in question. By the application of such a rule, we, conceivably, might award a plaintiff in such a case, a sum greatly in excess of the value of all of his lands, while he still retained the ownership and was able to make a very substantial use thereof. Expenditures for removals, repairs and abatement in such cases, in order that they may be chargeable against a defendant, and serve as a proper measure

of damages, must be reasonably necessary under the circumstances. They must be made in the exercise of ordinary prudence and economy, and in the course of what is a reasonably practicable and proper treatment of the situation, having in mind the damage which has been sustained, and the benefit which will accrue to the land owner by the expenditures proposed. This would be compliance with the rule requiring the payment of just compensation. Any substantial departure therefrom would not.

To take a somewhat analogous case, by way of further illustration, we may assume that in carrying on blasting operations, great quantities of rock from the face of a precipitous cliff might be cast upon the immediately adjacent land of a third person. Whether this be a nuisance or shall be given some other name, it is a tort, and there can be but one measure of damages, whatever shall be the name applied. The land itself might be worth a nominal amount only. Let us say that it would be entirely feasible to remove all the rock, but only at a great expense. The land might be worth quite as much to the owner after the rock was thrown thereon as it was before.

To use the cost of removal as the invariable measure of damages in such cases, the plaintiff, often, would be placed in a much better position financially than if there had been no nuisance or no encroachment. It would be much to his advantage to have the nuisance developed, if only the person responsible therefor were financially able to pay such damages as might be assessed against him under such rule. It is apparent that in such cases the cost of removal has no necessary and direct relation to the amount of the loss which the plaintiff has sustained, or to the benefits, if any, which would accrue to him if such expenditure were made, and for that reason, such cost is not always the proper measure of damages to apply. If such measure were adopted, the plaintiff often would receive a sum much greater than the loss he had sustained. He would be getting much more than a fair compensation. It is reasonably clear that this would be the situation here if the item of $3500.00 were allowed.

In this case the ordinary rule of allowing as damages the diminution in the rental or usable value of the land, together with the right to bring successive actions for damages, will afford ample and accurate compensation for the wrongs of which plaintiff complains.

An examination of the statutes of Missouri indicates that the financial difficulties which defendant claims would render it impossible to comply with the decree herein, are not insurmountable.

After preparation of the opinion herein, attention has been called to the case of *Kent* v. *City of Trenton*, 48 S. W. (2d) 571. (Kansas City Court of Appeals). Upon any one of two or more grounds specified in the opinion, that case was rightly decided. It has been called to the attention of this court because of the statements therein as to the character of the nuisance there involved. In reliance upon the numerous authorities hereinbefore cited, including certain cases decided by the federal courts in this Circuit, we adhere to the views hereinbefore expressed.

The decree should be modified by eliminating therefrom the item of $3500.00 allowed to plaintiff therein, and, as so modified, should be affirmed. Let the appellant pay one-third of the costs in this court and let the appellee pay two-thirds thereof.

Filed August 5, 1932.

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196 (Decree.)

United States Circuit Court of Appeals,
Eighth Circuit.

May Term, 1932.

Monday, August 8, 1932.

City of Harrisonville, Missouri, Appellant,
No. 9241 vs.
W. S. Dickey Clay Manufacturing Company.

Appeal from the District Court of the United States for the Western District of Missouri.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Western District of Missouri, and was argued by counsel.

On Consideration Whereof, it is now here ordered, adjudged, and decreed by this Court, that the decree of the said District Court, in this cause be, and the same is hereby, modified by eliminating therefrom the item of Three Thousand Five Hundred and no/100 ($3,500.00) Dollars allowed to the Plaintiff, the W. S. Dickey Clay Manufacturing Company, and as thus modified the said decree is hereby affirmed.

It is further ordered that the Appellant, City of Harrisonville, Missouri, pay one-third of the costs and the Appellee, W. S. Dickey Clay Manufacturing Company, pay two-thirds of the costs on the appeal in this Court.

August 8, 1932.

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197 In the United States Circuit Court of Appeals,
Eighth Circuit.

May Term, A. D., 1932.

City of Harrisonville, Missouri, Appellant,
No. 9241 vs. In Equity.
W. S. Dickey Clay Manufacturing Company, Appellee.

Appealed from the District Court of the United States for the Western District of Missouri.

Petition for Rehearing.

Now comes the appellant herein, City of Harrisonville, Missouri, and petitions the court for a rehearing of this cause upon the ground that the court, as shown by its opinion, has inadvertently overlooked the following material matters of law and fact:

1. The matter of law announced as Point VI, page 27 of appellant's brief, reading as follows:

"An alleged nuisance serving a public interest, the enforced abandonment of which must work great public
198 harm, will not be enjoined upon the complaint of a private individual of mere property damage. The land owner is left to his right of recovery of original damages as for a permanent nuisance."

2. The matter of law announced as Point VII, page 27 of appellant's brief, reading as follows:

"An order in effect requiring the defendant City to make an expenditure equal to the total damages which would be suffered by the plaintiff, its successors and assigns, on account of the alleged nuisance over a period of 340 years is unreasonable and in violation of all principles of equity."

3. The matter of law announced in the double-barreled definition of a permanent nuisance in Point II (a), page 24 of appellant's brief, as follows:

"(a) A permanent structural nuisance is one that will continue without change from any cause but human labor.

Or it may be one which cannot be abated without adversely affecting the public interest."

4. The matter of law announced in Point IV (b), page 26 of appellant's brief, reading as follows:

"(b) It (the court) has no such right (the right to require city officials and electors to exercise legislative powers in favor of the erection of a secondary disposal plant), particularly, where a favorable exercise of such discretion could only operate in violation of the state constitution and statutes limiting city expenditures. The court is as much bound by the constitution and statutes as the city officals and the voters. An erection of a secondary disposal plant was legally beyond the financial capacity of the City (1) at the time the plant was erected, and (2) continued so to be up to the time of the trial of this case."

5. The matter of fact that appellant contests the creation of a nuisance by said sewer system and Imhoff tank. The court in the third paragraph of its opinion in referring to the sewer system and Imhoff tank says:

"Defendant admits that the matters complained of constitute a nuisance, but asserts, etc."

199 Appellant, on the contrary, in Point I (b), page 24 of its brief, said:

"Plaintiff has failed to show that the City by the construction and operation of its sewer has added materially to the contamination already present in Town Creek."

This position is reiterated throughout the brief.

6. The matter of fact that the remedy proposed by the plaintiff is not that of a supplementary tank, as referred to in the court's opinion, but that of a supplementary plant costing $30,000.00, more than half the cost of the entire Harrisonville sewer system in the construction of which it exhausted its debt-making power for such purpose.

Respectfully submitted,

RAYMOND G. BARNETT,
ALLEN B. GLENN,
Attorneys for Appellant.

Certificate of Counsel.

I, Raymond G. Barnett, of Kansas City, Missouri, regularly admitted to practice in the United States Circuit Court of

Appeals for the Eighth Circuit, do hereby certify that the foregoing petition for a rehearing of this case is presented in good faith, and in my opinion is well founded, and is not presented for the purpose of delay.

September 2nd, 1932.

RAYMOND G. BARNETT.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Sep. 6, 1932.

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200 (Order denying Petition for Rehearing.)

October Term, 1932.

Wednesday, October 5, 1932.

This cause came on this day to heard upon the petition for a rehearing, filed by Counsel for Appellant.

On consideration whereof, it is now here ordered by this Court, that said petition for a rehearing of this cause, be, and the same is hereby denied.

October 5, 1932.

(Petition to Stay Issuance of Mandate.)

Now comes the appellant in the above entitled cause, and prays the court to stay the issuance of the mandate herein for the reason that appellant intends to make application in the above-entitled cause to the Supreme Court of the United States for the issuance herein of its writ of certiorari, to which end appellant will without delay file in the Supreme Court of the United States its petition and brief for the issuance of such writ and a certified copy of the record herein.

RAYMOND G. BARNETT
ALLEN B. GLENN
Attorneys for Appellant.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Oct. 24, 1932.

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201 (Order Staying Issuance of Mandate.)

October Term, 1932.

Friday, October 28, 1932.

On Consideration of the motion of appellant for stay of the mandate in this cause pending a petition to the Supreme

Court of the United States for a writ of certiorari, It is now here ordered by this Court that the issuance of the mandate herein be, and the same is hereby, stayed for a period of thirty days from and after this date, and if within said period of thirty days there is filed with the Clerk of this Court a certificate of the Clerk of the Supreme Court of the United States that a petition for writ of certiorari, record and brief have been filed, the stay hereby granted shall continue until the final disposition of the case by the Supreme Court.

October 28, 1932.

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202 (Clerk's Certificate.)

United States Circuit Court of Appeals,
Eighth Circuit.

I, E. E. Koch, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing contains the transcript of the record from the District Court of the United States for the Western District of Missouri as prepared and printed under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its Clerk, and full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion, had and filed in the United States Circuit Court of Appeals, except the full captions, titles and endorsements omitted in pursuance of the rules of the Supreme Court of the United States in a certain cause in said Circuit Court of Appeals wherein the City of Harrisonville, Missouri, was Appellant, and the W. S. Dickey Clay Manufacturing Company was Appellee, No. 9241, as full, true and complete as the originals of the same remain on file and of record in my office.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, this thirty-first day of October, A. D. 1932.

(Seal)

E. E. KOCH,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed January 23, 1933

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILED
DEC 19 19
CHARLES ELMORE

No. 559

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1932.

CITY OF HARRISONVILLE, MISSOURI,
PETITIONER,

VS.

W. S. DICKEY CLAY MANUFACTURING
COMPANY, RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

RAYMOND G. BARNETT,
1701 Fidelity Bank Building,
Kansas City, Missouri,
ALLEN B. GLENN,
Harrisonville, Missouri,
Attorneys for Petitioner.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1932.

CITY OF HARRISONVILLE, MISSOURI,
PETITIONER,

VS.

W. S. DICKEY CLAY MANUFACTURING
COMPANY, RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

MAY IT PLEASE THE COURT:

The petitioner, City of Harrisonville, Missouri, prays that a writ of certiorari issue to review the decree of the Circuit Court of Appeals, for the Eighth Circuit, entered in the above entitled cause on August 5, 1932, opinion by District Judge Cant (R. p. 185), (61 Fed. (2d) 210), petition for rehearing being overruled October 5, 1932 (R. p. 196), affirming, subject

to a slight modification, the decree of the District Court for the Western District of Missouri, District Judge Reeves (R. p. 177), (not reported).

A.

QUESTIONS OF GENERAL LAW INVOLVED.

How far may a court properly go in prescribing by injunction what a municipality shall or shall not do?

1. Whether, in a case where a municipality of two thousand people has constructed a general sewer system essential to its sanitation terminating in a permanent concrete disposal plant practically self-operating, which by reason of its inherent character manifest from its first operation removes from the sewage sixty per cent only of the putrescible matter and discharges the effluent at a point in a wooded pasture in the line of the City's natural drainage, well beyond the city limits and the proximity of any human habitation, into a watercourse that rises in the town and has always received the natural drainage of the filth and waste of the town, and which plant inflicts by such discharge of effluent a property damage to such pasture land of $100.00 per year—whether a court, in an action by such landowner should hold such disposal plant to be a *temporary* nuisance, the further use thereof to be enjoined unless the town shall erect an additional disposal plant costing $30,000.00; or whether the court, because of considerations of public interest and because of the substantial character of the structure, should hold the same to be a *permanent* nuisance,

not subject to be abated by court order, but affording to the aggrieved property owner a right of action for original and final damages.

2. Whether a court, by the character of its order of injunction, may properly so far command the legislative functions of the municipality as to require it to build an additional sewage disposal plant as the price of the continued use of its sewer system.

3. Whether in such a case a court may properly make such an order, regardless of the City's financial inability to comply under the revenue limitations of the state constitution.

4. Whether equity will consider a continuing property damage of $100.00 a year sufficient ground for enjoining a municipality of two thousand people from the further use of its general sewer system unless such municipality erects an additional sewage disposal plant costing $30,000.00.

B.

QUESTIONS OF LOCAL LAW INVOLVED.

1. Whether said sewer plant is. (a) by virtue of its physical character, and (b) by virtue of the public interest which it serves, a permanent nuisance not subject to be abated by court order, but affording the aggrieved property owner a right of action only for original and final damages.

The United States Circuit Court of Appeals herein says, "No." The courts of Missouri say, "Yes."

2. Whether, in view of the undisputed evidence of the City's financial condition, showing a total annual tax levy at the maximum legal rate for general revenue purposes of $6,120.59 and an unexhausted bonding power of only $12,583, it has the financial resources, by virtue (1) of its general revenue funds, or (2) of its bonding power, or (3) of some method of special assessment, to erect as a part of the public sewer system in question an additional sewage disposal plant costing $30,0000.

The United States Circuit Court of Appeals herein says, "Yes." The Constitution of the State of Missouri, Sections 11 and 12 of Article X, and the courts of Missouri say, "No."

STATEMENT.

W. S. Dickey Clay Manufacturing Company, on August 31, 1928, filed in the District Court of the United States for the Western Division of Missouri, its petition (R. 2) complaining that the petitioner herein, City of Harrisonville, Missouri, and the Missouri Pacific Railroad (a nominal defendant) were operating a sewer system terminating in an Imhoff tank, located on one side of the railroad right-of-way, which discharged its effluent by a tile running thereunder into a creek on plaintiff's land; and alleging that said Imhoff tank was merely a primary disposal plant and that "by reason of the failure and refusal of the City to construct, maintain and operate proper and adequate secondary disposal facilities for its sewage,

a nuisance is created" (R. 8, Par. 13), and the waters of the stream running through plaintiff's wooded pasture land are polluted, all to the plaintiff's damage; and praying the court for an award of damages and that the City "be perpetually enjoined from the discharge into the said watercourse upon the plaintiff's land of raw sewage and/or from the effluent of an improper, inadequate and insufficient sewage disposal plant, and that the defendant City of Harrisonville be given a reasonable time to construct and place in operation a sufficient and adequate sewage disposal plant" (R. 10).

Five years previous to the institution of such action, to-wit, in 1923, the City of Harrisonville, population 2,000, for compelling sanitary reasons (R. 96, 72, 73), constructed the sewer system in question at a cost of approximately $60,000.00, through the sale of bonds, exhausting the City's constitutional debt-making power for that purpose (R. 74, 83).

The City is located on the top of a gentle rise with the land falling away in all directions (R. 42). Town Creek rises in the northeast part of town (R. 73, 77), circles through the town on the north (map, Defendant's Exhibit B, R. 159), passes beyond the city limits on the west, and turns south across plaintiff's land where, in its southerly course (R. 141), it receives the effluent from the aforesaid sewer system. This point is a quarter of a mile from any human habitation (R. 141). The pasture is used and has been used for grazing cattle only (R. 38, 43).

In 1923, Walter S. Dickey, president and majority stockholder in respondent company, owned the pasture land in question and continued to own it up until 1925, the date of the Delaware incorporation of said company (R. 42). Respondent, with full knowledge of the sewer and its discharge, acquired the property in question in 1925 (R. 42).

The Imhoff tank in question is a concrete structure roughly 23 feet deep, 20 feet long and 21 feet wide, divided into several chambers (Defendant's Exhibit B, R. 161, 163) and costing approximately half of the entire cost of the sewer system (Exhibit B, R. 161). It removes approximately only sixty per cent of the putrescible matter (R. 51, 77, 86). This characteristic of the plant is inherent and permanent (R. 52, 51). By the erection of a secondary disposal plant at a cost of approximately $30,000.00 (R. 52), further putrescible matter might be removed up to the aggregate amount of ninety per cent (R. 95, 180).

The trial court found that the respondent had sustained a property damage to the extent of $100.00 a year (R. 181), for the five-year period between the time that it acquired this property in 1925 and the date of the court's decree in 1930; and also that it would cost $3,500.00 for such excavation of the creek as would remove from it all of the marks of pollution (R. 15, 70). The only evidence (R. 50) of any more efficient method of sewage disposal was that of an additional plant to cost approximately $30,000.00 as aforesaid.

The trial court's decree does not mention in express terms a secondary plant, but that is what the respondent referred to in its petition (R. 7, 10), and that is what it offered as proof (R. 50), and that is what the court's decree refers to in effect in paragraph (3) thereof (R. 15, 180).

The trial court entered a judgment against the City of Harrisonville, petitioners here, in the amount of $4,000.00 consisting of $500 for five years continuing damage, and $3,500 representing the excavation item (R. 15), and enjoined the City "from the discharge of putrescible sewage matter into said watercourse on or above said plaintiff's land," with a provision that the City should have six months in which to abate the nuisance (R. 16), that being the time estimated required to construct the additional disposal plant (R. 181).

The Circuit Court of Appeals (R. 193) affirmed this decree except for the item of $3,500.00 excavation cost which it directed be eliminated therefrom.

The decree thus modified requires in effect that the City erect the additional plant or abandon its sewer system.

The evidence concerning the City's financial ability to build a secondary system fell under two heads: (1) the City's general revenue fund, including its resources therefor; (2) the City's debt-making power, including its outstanding bonded indebtedness.

1. The general revenue fund of the City, it is undisputed, is limited by Section 11, Article X, of

the Constitution of Missouri to a levy not exceeding fifty cents on the $100.00 valuation. At the present time the City levies its taxes at this maximum rate (R. 112). The City does not make its own property valuation, but the same as required by law is reported to it each year by the county clerk (R. 113), and the last assessment thus reported prior to the trial was that of June 1st, 1928, in the amount of $1,224,118.00 (R. 101), covering both real and personal property. On this basis, making no deductions for uncollectible items, which are considerable (R. 102), the annual general revenue fund is $6,120.59. This literally is scarcely sufficient to pay the City's ordinary current expenses (R. 112).

A $30,000.00 improvement to be paid for over a period of ten years with five per cent interest on deferred payments, if paid from the general revenue fund under Section 7276, R. S. Mo., 1929, enacted in 1929, as contended by the respondent could be done, would require for the first year out of the $6,000.00 fund an expenditure for the new disposal plant of $4,500.00, and would require annual expenditures thereafter of substantially the same amount, all in addition to the City's ordinary current expenses, which must be paid first out of general revenues.

2. The bonding power of the City at the time of this improvevment in 1923, subject to one exception which will later be specifically named, is limited by Section 12, Article X, of the Constitution of Missouri to the amount of "five per centum on the value

of the taxable property therein, to be ascertained by the assessment next before the last assessment for state and county purposes, previous to the incurring of such indebtedness," and this is available only upon a two-thirds vote of the voters, at an election held for the purpose of obtaining their consent. At the time of trial the last assessment answering this description was that of June 1st, 1927, showing (R. 101) an amount of $1,101,672.00, of which amount five per cent equals the sum of $55,083.00. At the time of the trial there remained unpaid bonds incurred for this very sewer improvement in the amount of $39,000.00, and another item of bonds outstanding of $3,500.00 (R. 100, 102), leaving unexhausted and available out of a $55,083.00 City debt-making power, the sum of $12,583.00.

The excepted additional debt-making power referred to in the opening of the last paragraph is that enjoyed by the City under Section 12-a, Article X, of the Constitution of Missouri for specific purposes that do not include sewers. This power the City of Harrisonville has exercised, as is shown in its financial statement by the item of waterworks bonds outstanding in the amount of $100,000.00 (R. 102).

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS INVOKED BY THE PARTIES HERETO.

Section 11, Article X, Constitution of Missouri (cited by petitioners):

> "Taxes for county, city, town and school purposes may be levied on all subjects and objects of

taxation; but the valuation of property therefor shall not exceed the valuation of the same property in such town, city or school district for state and county purposes. For county purposes the annual rate on property, in counties having $6,000,000.00 or less, shall not, in the aggregate, exceed fifty cents on the $100.00 valuation; * * * in cities and towns having less than 10,000 and more than 1,000 inhabitants, said rate shall not exceed fifty cents on the $100.00 valuation. * * * Said restrictions as to rates shall apply to taxes of every kind and description, whether general or special, except taxes to pay valid indebtedness now existing, or bonds which may be issued in renewal of such indebtedness." (Constitution of the State of Missouri, adopted 1875, R. S. Mo. 1929, page 137.)

Section 12, Article X, Constitution of Missouri (cited by petitioners):

"No county, city, town, township, school district or other political corporation or subdivision of the state shall be allowed to become indebted in any manner or for any purpose to an amount exceeding in any year the income and revenue provided for such year, without the consent of two-thirds of the voters thereof voting on such proposition, at an election to be held for that purpose; nor in cases requiring such assent shall any indebtedness be allowed to be incurred to an amount including existing indebtedness, in the aggregate exceeding five per centum on the value of the taxable property therein, to be ascertained by the assessment next before the last assessment for state and county purposes, previous to the incurring of such indebtedness, * * *." (Constitution of the State of Missouri, adopted 1875, R. S. Mo. 1929, page 139.)

Section 12-a, Article X, Constitution of Missouri (cited by petitioners):

> "Any city in this state, containing not more than thirty thousand (30,000) inhabitants, may, with the assent of two-thirds (2/3) of the voters thereof voting at an election held for that purpose, be allowed to become indebted in a larger amount than specified in Section 12 of Article X of the Constitution of this state, not exceeding an additional ten (10) per centum on the value of the taxable property therein for the purpose of purchasing or constructing waterworks, ice plants, electric or other light plants, to be owned exclusively by the city so purchasing or constructing the same: * * *." (Amendment to Constitution of the State of Missouri, adopted 1920, R. S. Mo. 1929, page 142.)

Section 7217, Revised Statutes of Missouri, 1929 (cited by petitioners), merely reiterates in statutory form the constitutional provisions of Section 12, Article X.

Section 7031, Revised Statutes of Missouri, 1929 (cited by respondent):

> "Board May Establish Sewer Systems. The board of aldermen shall have power to cause a general sewer system to be established, which shall be composed of three classes of sewers, to-wit: Public, district and private sewers. Public sewers shall be established along the principal courses of drainage, at such points, to such extent, of such dimensions and under such regulations as may be provided by ordinance, and these may be extensions or branches of sewers already constructed or entirely new throughout, as may be deemed expedient. The board of aldermen may levy a tax

on all property made taxable for state purposes over the whole city, to pay for the constructing, reconstructing and repairing of such work, which tax shall be called 'special public sewer tax,' and shall be such amount as may be required for the sewer provided by ordinance to be built; and the fund arising from said tax shall be appropriated solely to the constructing, reconstructing and repairing of said sewer." (This statute must be read in the light of *Union Trust Co.* v. *Pagenstecher Tax Collector*, 221 Mo. 121, 119 S. W. 1103, which holds that in so far as it attempts to provide for a *public* sewer on an assessment or special tax plan it is unconstitutional as violative of Section 11, Article X of the Constitution of Missouri.)

Section 7032, Revised Statutes of Missouri, 1929 (cited by respondent), covers the subject of *district* sewers, how they may be established, and paid for, on an assessment basis by the issuance of special tax bills.

Section 7037, Revised Statutes of Missouri, 1929 (cited by respondent), provides that two or more *district* sewers may be united into a *joint district sewer*.

Section 7038, Revised Statutes of Missouri, 1929 (cited by respondent):

"PURIFYING DISCHARGE, HOW PAID FOR. Whenever the city shall deem it necessary it may, by ordinance, provide for the construction of a septic tank or other sewage reduction device for the purpose of purifying the discharge from any *district or joint district sewer*. In such case the cost thereof shall be assessed against the lands in the district or joint district for which the same

is provided in the same manner as is provided for the assessing of the cost of district sewers."

Section 7276, Revised Statutes of Missouri, 1929 (enacted in 1929) (cited by respondent):

"AUTHORIZED AND EMPOWERED TO PROVIDE MEANS TO PROTECT PUBLIC HEALTH. In addition to all powers now possessed by cities of the second, third and fourth classes in this state for the protection of the public health, each city of the second, third, or fourth class of this state is hereby authorized and empowered to provide for the gathering, handling and disposition, either by itself, or by contract with others, for the gathering, handling and disposition of garbage, trash, cinders, refuse matter and municipal waste accumulating in such cities, *and to pay for the same out of general revenues or by collection of charges for such service*, and to do such other and further acts as may be deemed expedient for the protection and preservation of the public health, as such public health may be affected by the accumulation of trash, cinders, garbage, refuse matter and municipal waste; to acquire by purchase, construction, lease, gift or otherwise, within or without the corporate limits of such cities an incinerator or incinerators for the destruction of such garbage, trash, cinders, refuse matter and municipal waste; to acquire by any of such means all equipment necessary or expedient for use in the collection, handling and disposition of garbage, trash, cinders, refuse matter and municipal waste; *to acquire by any of such means a purification plant or plants or sewage disposal plant for the purification of all sewage accumulating in such cities.* Such incinerator or incinerators, equipment, purification plant or plants or sewage disposal plant, may be acquired by such cities with funds derived from the issue and sale of bonds in the manner provided

by law for the issue and sale of bonds for other public purposes; *or such may enter into contract for the construction or purchase of such incinerator or* ***incinerators, equipment*** *or purification plant or plants or sewage disposal plant to be paid for out of the general revenues of such cities in annual installments*: Provided, however, that the period of payment for any such incinerator or incinerators, equipment, purification plant or plants or sewage disposal plant, or any contract for the construction, purchase or lease thereof out of the general revenues of such cities shall not extend over a longer period of time than ten (10) years." (Laws of Missouri, 1929, page 319.)

COURT DECREES.

Decree of District Court.

(July 10, 1930, R. 15.)

"This cause came on to be further heard at this term and was argued by counsel and thereupon upon consideration thereof it was ordered, adjudged and decreed as follows:

"1. The court finds the issues upon the plaintiff's bill of complaint in favor of the plaintiff and against the defendants.

"2. The court finds that the effluent from the sewage system and the sewage disposal plant of the defendant City of Harrisonville is discharged into Town Creek, a watercourse flowing through and upon the land of the plaintiff; that such effluent pollutes and contaminates said creek (rendering) it filthy and creating in said creek and upon and over the land of the

plaintiff noxious and offensive odors; that by reason of the discharge of said effluent into the said watercourse a nuisance is created in said watercourse in and upon plaintiff's land.

"3. The court finds that it is unnecessary for the defendant City of Harrisonville to discharge raw or partially treated sewage into the said watercourse upon plaintiff's land, and that the defendant City may by use of reasonable means available to said defendant City abate the said nuisance, and that six months' time from the date of this decree is a reasonable time within which the said defendant City may abate said nuisance.

"4. The court finds that by reason of the said nuisance and the continuance thereof to date plaintiff has been damaged by loss of rents and profits from its said land in the sum of five hundred dollars ($500.00) and by reason of the cost and expense of restoring said creek to the condition in which it existed prior to the creation of said nuisance by said defendant City in the sum of three thousand five hundred dollars ($3,500.00).

"5. (This paragraph deals with the Missouri Pacific Railroad Company, merely a nominal defendant.)

"Wherefore, it is ordered, adjudged and decreed, that plaintiff have and recover of the defendant City of Harrisonville the sum of four thousand dollars ($4,000.00) with interest thereon at the rate of six per cent per annum from this date with costs to said

plaintiff to be taxed, and that plaintiff have execution therefor. It is further ordered, adjudged and decreed that the defendant City of Harrisonville be and it is hereby enjoined from the discharge of putrescible sewage matter into said watercourse in, on, or above said plaintiff's land; provided, however, and it is further ordered, adjudged and decreed that the said defendant be, and it is hereby given a period of six months from the date of this decree in which to abate the said nuisance by such adequate and effective method or methods as the said defendant City may select to prevent, cease and determine the discharge of putrescible sewage matter into the said watercourse in, on or above said plaintiff's land. It is further ordered, adjudged and decreed that and the court hereby reserves jurisdiction of this cause for the rendition of such further orders with respect to enforcement and execution of this judgment and decree as shall be deemed by the court necessary in the premises. To all of which judgment, order and decree the defendants except."

Decree of Circuit Court of Appeals.

(August 8, 1932, R. 193.)

"This cause came on to be heard on the transcript of the record from the District Court of the United States for the Western District of Missouri, and was argued by counsel.

"On consideration whereof, it is now here ordered, adjudged, and decreed by this court, that the

decree of the said District Court, in this cause be, and the same is hereby, modified by eliminating therefrom the item of three thousand five hundred and no/100 ($3,500.00) dollars allowed to the plaintiff, the W. S. Dickey Clay Manufacturing Company, and as thus modified the said decree is hereby affirmed.

"It is further ordered that the appellant, City of Harrisonville, Missouri, pay one-third of the costs and the appellee, W. S. Dickey Clay Manufacturing Company, pay two-thirds of the costs on the appeal in this court."

REASONS FOR REVIEW.

A.

Questions of General Law Involved.

Few fields of the law are more wanting in well beaten paths of judicial decision than that dealing with the extent to which a court may properly go in prescribing by injunction what a municipality shall or shall not do; and there are few fields of the law wherein decisions may affect more people in more ways running the complete gamut from pocketbook to health and life.

Increasingly important become decisions in this field as the density of population and the burden of taxation increase.

1.

TEMPORARY OR PERMANENT NUISANCE.

In the two-fold realm of municipal sanitation and taxation, it would seem that under the compelling social considerations of community life, the more enlightened view with reference to the maintenance of an alleged nuisance by the municipality is that the preponderance of consideration is to be given the public welfare as against any mere claim of property damage which can be compensated for in money. While there is substantial conflict on the subject in the decisions of various courts, many courts representing apparently the majority opinion consider the public interest a deciding factor in determining whether an alleged nuisance is to be classified as temporary and abatable by court order, or as permanent to be entirely compensated for in one action for damages. In effect, at least in many instances, this latter view is equivalent to a condemnation proceeding. A true condemnation proceeding is purely statutory and often, as in the present case, the legislature has failed to foresee the necessity and provide the machinery therefor.

The Circuit Court of Appeals, according to its opinion, has given but brief consideration to this matter which is the major issue of the lawsuit. That court's sole pronouncement on this point in the course of a ten-page opinion consists of two widely separated paragraphs, as follows:

> (R. 187, 193) "The nuisance here in question being such as might be abated by order of court,

is temporary in character, *Foncannon* v. *City of Kirksville,* 88 Mo. App. 279, 284; *Pinney* v. *Berry,* 61 Mo. 359, 367; *Ready* v. *Mo. Pac. Railway,* 98 Mo. App. 467, 470, and plaintiff is entitled to injunctive relief. *Carmichael* v. *Texarkana,* 94 Fed. 561, 571, 573, 574; also 116 Fed. 845, 849 (C. C. A. 8); *Mo.* v. *Illinois & Chicago Drainage District,* 180 U. S. 208, and authorities cited at pages 245-247; *Winchell* v. *City of Waukesha,* 110 Wisconsin 101; *Haskell* v. *New Bedford,* 108 Mass. 208, 216; *et seq.* * * *

* * * * * * *

"After preparation of the opinion herein attention has been called to the case of *Kent* v. *City of Trenton,* 48 S. W. (2d) 571 (K. C. Court of Appeals). Upon any one of two or more grounds specified in the opinion, that case was rightly decided. It has been called to the attention of this court because of the statements therein as to the character of the nuisance there involved. In reliance upon the numerous authorities hereinbefore cited, including several cases decided by the federal courts in this circuit, we adhere to the views hereinbefore expressed."

Observe in the first paragraph quoted a clear case of reasoning in a circle. Because the nuisance may be abated by court order, that is, may be enjoined, it is a temporary nuisance and therefore it may be enjoined.

2.

JUDICIAL ATTEMPT TO COMPEL EXERCISE OF LEGISLATIVE POWER.

Any employment by a court of the writ of injunction against a municipality involves a consideration

of the distinctions in our governmental scheme between judicial and legislative powers. Especially is this true if the injunction in question is in effect a mandatory one. Mandatory, petitioner contends, is the present injunction, despite the fact that it is couched in negative terms. It takes on this mandatory character because the operation of the order is deferred for a period of six months, that being the time required under the proof for the erection of an additional disposal plant; and because such a plant was the sole method suggested in the pleadings and the proof and the opinion of the court by which the City could continue the operation of its sewer system with a substantially diminished discharge of putrescible matter. Under the pleadings, the proof and the decree, therefore, the City can do only one of two things, either erect this additional plant or discontinue the use of its sewer system.

> (Decree, R. 16) "It is further ordered, adjudged and decreed that the defendant City of Harrisonville be and it is hereby enjoined from the discharge of putrescible sewage matter into said watercourse in, on or above said plaintiff's land; provided, however, and it is further ordered, adjudged and decreed, that the said defendant be, and it is hereby given a period of six months from the date of this decree in which to abate the said nuisance by such adequate and effective method or methods, as the said defendant City may select to prevent, cease and determine the discharge of putrescible sewage matter into the said watercourse in, on or above said plaintiff's land."

However, the erection of a secondary disposal plant involves legislative functions with which the court may not rightfully interfere. The city council would have to pass a resolution deeming and finding it necessary to construct an additional disposal plant and calling for the preparation of plans and specifications and an estimate of costs. After receipt of such plans and specifications the council would have to pass an ordinance requiring the work to be done. After the action by the mayor and city clerk in securing bids the council would have to pass an ordinance awarding the contract to the lowest and best bidder if his bid were within the estimate.

These steps would have to be taken regardless of whether the money to pay for the improvement were to be drawn from the City's general revenue fund or from the sale of bonds. And in the latter case the proposition for the sale of bonds for such purpose would further have to be submitted to the voters and be carried by a two-thirds majority vote.

Moreover, in an undertaking to erect this plant through one other plan suggested by respondent, to-wit, the establishment of sewer districts and the payment for the plant by special assessments upon property owners, the sewer districts would have to be established by ordinance (assuming at this point for argument's sake that the same could be done lawfully, notwithstanding the fact that the present sewer system is a *public* sewer), and the City would also by ordinance have to provide that it deemed the construction of an additional plant necessary, and pro-

vide for the assessment of the cost of such construction against the lands in the sewer district.

One paragraph in the opinion of the Court of Appeals, and only one, makes some approach to this matter, but at that falls short of actual contact therewith, because this question is not, as the Circuit Court of Appeals appears to think, whether a sewer system is or is not beyond judicial control. So far as any conflict between legislative and judicial functions is concerned, it may be conceded, at least for the purpose of this case, that *a court has the right to enjoin a city from further use of its sewer system.* The point of this case lies yet ahead, to-wit, *may the court* by the conditional character of its decree, in effect, *require the City to construct an additional disposal plant?* If it cannot, then the construction of such a plant has no place as a factor influencing the court to issue its order of injunction.

The sole paragraph in which the Court of Appeals disposes of this matter reads as follows:

> (R. 187.) "The fact that the sewage system and the Imhoff tank in question were installed pursuant to the direction of the governing body of the city does not place them beyond judicial control. *Carmichael* v. *Texarkana,* 94 Fed. 561, 570-574. Approved in case of same title at 116 Fed. 845, 849 (C. C. A. 8). *Winchell* v. *City of Waukesha,* 110 Wis. 101. *Seifert* v. *City of Brooklyn,* 101 New York 136, 139, *et seq.,* 143 *et seq.*"

3.

DISREGARD OF CITY'S REVENUE LIMITATIONS UNDER THE STATE CONSTITUTION.

An order which in effect requires a city either to abandon its general sewer system or to erect an additional sewage disposal plant in connection therewith, must take into consideration the city's financial resources for compliance with the latter alternative, under the applicable revenue limitations of the state constitution and statutes. Those limitations, under the undisputed evidence of the City's financial condition, make it impossible for the City to erect the additional disposal plant in question, and leave the City no alternative under the decree but to abandon the use of its general sewer system. See Sections 11 and 12, Article X, Constitution of Missouri, herein set out at pages 9-10 and *Union Trust Co.* v. *Pagenstecher, Collector*, 221 Mo. 121, 119 S. W. 1103, holding that under the Constitution of Missouri a municipality may not pay for a public sewer by special assessment, any statute to the contrary notwithstanding.

The sole reference in the opinion of the Court of Appeals to this matter refers only to statutory provisions and makes no mention of the constitutional limitations. That reference is as follows:

> (R. 193.) "An examination of the statutes of Missouri indicates that the financial difficulties, which defendant claims would render it impossible to comply with the decree herein, are not insurmountable."

4.

Disparity Between the Injury and the Requirements of the Decree.

Regardless of whether the nuisance be classed as permanent or temporary, and of whether the order in question is an invasion of legislative functions, and of whether the City may within its constitutional and statutory limitations provide the funds for such a disposal plant, yet the fact remains that equity does not uphold a decree requiring the City to expend an additional $30,000.00 merely for the purpose of saving the plaintiff a continuing property damage of $100.00 per year. In such case, even if the court consider that the structure in question is a temporary nuisance, the award of temporary damages without any order of abatement is sufficient. The door still remains open for the recovery of subsequently accruing damages. But to put a small municipality, which has exhausted its bonding limit in providing, on account of the health of its people, a sanitary sewer system, and which has placed the outlet thereof as directed by law and without any purpose of malice against respondent, to an immediate expenditure of an amount equal to the total damage sufferable by respondent over a period of three hundred years is not in conformance with equity principles.

REASONS FOR REVIEW CONTINUED.

B.

Questions of Local Law Involved.

1.

TEMPORARY OR PERMANENT NUISANCE.

In the field of state law, petitioner points out that the sewer system and disposal plant in question should have been held herein to have been a permanent rather than a temporary nuisance for two reasons, either alone sufficient: (1) The physical character of the structure, and (2) the public interest therein. That is the holding of the Missouri courts, and in holding otherwise the District Court and the Circuit Court of Appeals herein fell into direct conflict with the law of Missouri. The sole expression of the Circuit Court of Appeals on this subject is that already quoted herein under A-1, page 18.

Missouri Decisions.

Kent v. *City of Trenton*, (Dec., 1931, Kansas City Court of Appeals, part of the Missouri system of appellate courts of last resort), 48 S. W. (2d) 571, l. c. 575, (not yet reported in official Missouri reports):

> "The petition attempts to base a cause of action upon the wrongful construction and maintenance of the original sewer. It is too plain for controversy that it is not based upon an increase of sewage occasioned by the new sewer after 1923. The original sewer was completed in 1914 and put in use. The outfall pipe was carried across a part

of the land in question and terminated thereon, and thereafter discharged sewage on the land. It was permanent as distinguished from a temporary structure or a so-called continuing nuisance which was likely to be abated. It is entirely obvious that damage did then result and would inevitably result and continue indefinitely. This damage was to the inheritance. There was an actual entry upon and possession of the land which was open and adverse in character. There is no showing that it was permissive under a license revocable at will. Under the circumstances, a cause of action for the damage arose immediately, and this cause of action accrued to the then owner of the land and was not transmitted to plaintiffs as subsequent grantees. *Hayes* v. *Railroad*, 177 Mo. App. 201, 208, 162 S. W. 266; *Powers* v. *Railroad*, 158 Mo. 87, 102, 57 S. W. 1090; *Luckey* v. *Brookfield*, 167 Mo. App. 161, 151 S. W. 201; *Smith* v. *Sedalia*, 152 Mo. 283, 53 S. W. 907, 48 L. R. A. 711; *Smith* v. *Sedalia*, 244 Mo. 107, 149 S. W. 597; *Irvine* v. *City of Oelwein*, 170 Iowa 653, 150 N. W. 674, L. R. A. 1916E, 990; *Payne* v. *Smith*, 198 Ky. 564, 249 S. W. 995; 27 R. C. L., Section 292. Permanent structures of a public character such as sewers and railroads resulting in damage from trespass or nuisance are regarded as unabatable, and the damage occasioned is at once recoverable. See cases *supra*."

Hayes v. *Railroad*, (Dec., 1913, Springfield Court of Appeals, also part of the Missouri system of appellate courts of last resort), 177 Mo. App. 201; 162 S. W. 266, is a case dealing with a railroad embankment that in wet weather backed up water over the plaintiff's land. The court therein, while pointing out that except for a special Missouri statute on the subject of railroad embankments, an embankment constitutes

a permanent nuisance, quoted from certain cases the rule which it adopted as its own, to-wit:

> (l. c. Mo. App. 210; l. c. S. W. 269): "In *Powers* v. *City of Council Bluffs*, 45 Iowa 652, 656, 659 (24 Am. Rep. 792) a case often approved by the courts of this state, the court said: 'While no infallible test can be applied to enable us to determine whether a structure is permanent or not, in as much as nothing is absolutely permanent, yet, when a structure is practically determined to be a permanent one, its permanency, if it is a nuisance, and will necessarily result in damages, will make the damages original. * * *.'"
>
> (l. c. Mo. App. 211; l. c. S. W. 269): "* * * The cause of action is single and the statute of limitation bars it where the injuries are permanent, because the nuisance causing them is permanent just the same as if the injuries are inherently permanent. In *James* v. *Kansas City*, 83 Mo. 567, 570, the court, quoting from *Powers* v. *Council Bluffs*, 45 Iowa 652, 24 Am. Rep. 792, says: 'Whenever the nuisance is of such a character that its continuance is necessarily an injury, and when it is of a *permanent character* that will continue without change from any cause but human labor, there the damage is an original damage, and may be at once fully compensated'" (court's own italics).

In the case of *Smith* v. *Sedalia*, (June, 1912) 244 Mo. 107, 149 S. W. 597, the court in holding a certain sewer and its outlet to be a permanent nuisance, said:

> (l. c. Mo. 121, l. c. S. W. 600): "We cite with approval the following from the opinion of Johnson, J., of the Kansas City Court of Appeals in this case:

"'These authorities compel us to say that the nuisance in question is permanent and that plaintiff, if injured thereby, had a cause of action for his damages, past and future, all of which were comprehended in and were to be measured by the depreciation in the market value of his land caused by the presence of the sewer. For eighteen years past the sewer had remained in its present condition. It is just as substantial and enduring as a railroad embankment, drainage ditch, highway bridge, street pavement, office building or city hall. It was built without any intention or expectation that it would be removed or materially changed for years to come; and if the present action was one for permanent damages, and was the only suit pending between the parties, we would not hesitate in declaring that plaintiff had made out a case for the jury, and that the true rule for measuring his damages w[illegible] the depreciation in the market value of the land.'

* * * * * * *

(l. c. Mo. 125, l. c. S. W. 601): "For still another reason, there can be no injunction in this case. The writ of injunction is an extraordinary remedy. It does not issue as of course, but somewhat at the discretion of the chancellor. It is his duty to consider its effect upon all parties in interest, and to issue it only in case it is necessary to protect a substantial right, and even then not against great public interests. An apt discussion and application of this doctrine are contained in the opinion of Lamm, J., in *Johnson* v. *Railway*, 227 Mo. loc. cit. 450, 127 S. W. 63. Surely no chancellor would enjoin the further operation of this large and costly sewer system, with the attendant danger to public health and convenience, when it clearly appears that any injury caused to plaintiff by the sewer can be fully compensated by a pending action at law."

Horine v. *People's Sewer Co.*, (June 1918, Springfield Court of Appeals) 200 Mo. App. 233, 204 S. W. 735: Here in this Horine case the plaintiffs sought to enjoin the discharge of city sewage upon their land. The court denied the injunction, citing as authority the above case of Smith vs. Sedalia, and quoting the last paragraph above quoted, and then following that with the following language of its own:

> (l. c. Mo. App. 237, l. c. S. W. 736): "The comparative injury rule seems not to have found much footing in this state, except where the public weal will likely substantially suffer if the injunction is granted; and, where the result of such public injury is so great on the one hand as compared to the injury complained of on the other, then it would be unconscionable to grant injunctive relief, and it will be denied (*Johnson* v. *Railroad, supra*), and certainly there can be no question in such circumstance when the party seeking injunctive relief has an adequate remedy at law. It is not the disparity in dollars and cents that furnishes a foundation for denying injunctive relief (*Steinmetz* v. *Federal Lead Co.*, (Sup.) 176 S. W. 1049), but the immeasurable value of the health and comfort of the public on the one hand as compared to a few dollars on the other. It was such a condition as last mentioned of which the Supreme Court was speaking when it used the language above quoted, to the effect that no chancellor under such circumstances would give injunctive relief when there was an adequate remedy at law."

2.

CONFLICT OF THE DECREE WITH CITY'S REVENUE LIMITATIONS UNDER THE STATE CONSTITUTION.

The price exacted by the court's decree for the City's continued use of its sewer system is its erection of an additional sewage disposal plant at a cost of $30,000.00. The City's financial statement shows that it has an empty treasury at the present time; that it has an annual general revenue income of only $6,-120.59, less such items of general levy as cannot be collected, and that it requires all of this amount for its ordinary current expenses which the law says are first to be paid out of this fund; that its unexhausted bonding resource is only $12,583.00.

Nor does the City have any power to pay for such an improvement by the third and last method suggested, to-wit, by special assessment under Section 7038, or Section 7276, R. S. Mo. 1929. First, incidentally, it must be realized that this Section 7276 is a new statute enacted in 1929 and not in existence and not conferring powers of any kind in 1923 at the time the sewer system was built. In the second place, neither this Section 7038 nor this Section 7276 nor any other section of the statutes can, even if so worded, confer power upon the City to raise the necessary funds by special assessment, because the sewer system here in question is a *public* sewer. The Supreme Court of Missouri has held that any attempt to construct a *public* sewer by a special assessment or special tax bill method is in violation of the State Con-

stitution, Section 11, Article X (*Union Trust Company v. Pagenstecher, Collector*, 221 Mo. 121, 119 S. W. 1103).

It is vitally important in the system of laws in this country that the courts, including the federal courts, shall make no order upon a municipality which ignores the constitutional limitations under which that municipality operates. The sole expression of the Circuit Court of Appeals on the subject of the City's financial difficulties has been quoted above (p. 23) under A-3.

Conclusion.

For these reasons it is respectfully submitted that this petition should be granted.

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BRIEF.

Opinions.

Full reference to the opinions appears in the opening prayer of the petition, page 1.

The Time Elements of Jurisdiction.

The time elements of jurisdiction are as follows:

August 8, 1932 (R. 193): Decree of Circuit Court of Appeals.

September 6, 1932 (R. 194): Petition for rehearing filed in Circuit Court of Appeals.

October 5, 1932 (R. 196): Order denying petition for rehearing.

December 19th, 1932: Petitioner files herein this petition and brief and the record.

Facts.

The facts are as stated in the petition, page 4, but petitioner calls special attention to the following:

1. Dates:

1923, the sewer system is constructed and put into operation;

1925, respondent acquires the property in question with full and intimate knowledge of said sewer system and the discharge therefrom;

1928, respondent files its bill in equity for injunction;

1930, the case is tried and decree is entered by the District Court;

1932, the decree subject to a slight modification is sustained by the Circuit Court of Appeals.

2. The present sewage disposal plant is substantial and permanent in its character of construction, is practically self-operating, and from the moment of its completion and first use has been manifestly inherently incapable of operation except in the manner found by the court to be objectionable, to-wit, by discharging an effluent carrying 40% of putrescible matter.

3. It is part of a public sewer system as distinguished from a district or joint district sewer system.

4. Its use is essential to the welfare of the municipality.

5. The damage found to be inflicted is property damage only and relatively inconsequential.

6. Respondent offers as the only solution for the continued operation of the sewer system with a discharge of substantially less putrescible matter, an additional disposal plant estimated by its own engineer to cost as much as $30,000.00.

7. The City at the time of constructing the present disposal plant issued bonds in the maximum of its constitutional authorization therefor and is without the

funds or the resources to secure the funds necessary to build such an additional $30,000.00 plant.

(a) The City's total annual *general revenues* amount to only about $6,000.00 and the erection of a $30,000.00 plant on a ten-year installment payment plan with interest at 5% would call for an expenditure from this fund the first year of $4,500.00, and amounts almost that large in succeeding years.

(b) It has available an unexhausted *bond resource* of only $12,583.00.

(c) It is denied by the state constitution, Section 11, Article X (*Union Trust Co.* v. *Pagenstecher, Tax Collector,* 221 Mo. 121, 119 S. W. 1103) the power to construct any part of a *public* sewer by the method of a special assessment (see Argument, p. 52).

ARGUMENT.

Jurisdiction of Subject Matter.

In the matter of general law the petition (p. 17) has already pointed out that the question concerning which petitioner alleges that the decision of the Circuit Court of Appeals is probably untenable and in conflict with the better rule, is an important one in its relation to the public interest.

In the matter of local law, petitioner amplifies here the reasons assigned in the petition for the statement that the law involved in the case is a matter of local law. The case involves the *property rights* of the City in its sewer system and it involves also the *property rights* of the respondent. In addition, and probably most importantly, it involves the definite constitutional limitations imposed upon the City by Sections 11 and 12, Article X of the Constitution of the State of Missouri and the construction thereof by the Supreme Court of the State of Missouri in *Union Trust Company* v. *Pagenstecher, Tax Collector,* 221 Mo. 121, 119 S. W. 1103. It also involves Section 7031, Revised Statutes of Missouri, 1929, as specifically construed in said last mentioned case of Union Trust Company, and also Sections 7038 and 7276, Revised Statutes of Missouri, 1929, which are subject to the same constitutional ruling as made in said Union Trust Company case with reference to Section 7031, which the Supreme Court in said case held to be unconstitutional as violative of Section 11,

Article X of the Constitution of Missouri, in so far as it might provide for the construction of a *public* sewer by special assessment.

That the foregoing are matters of local law governing the federal courts, has been long recognized in this court.

Swift v. *Tyson*, 16 Peters 1:

Justice Story in a case involving commercial paper, discussing the extent to which the law of the state was controlling on the federal courts said (l. c. 18):

> "In all the various cases which have hitherto come before us for decision, this court have uniformly supposed that the true interpretation of the 34th Section (Judiciary Act of 1789 requiring the federal courts in certain cases to follow the state law) limited its application to state laws strictly local, that is to say, to the positive statutes of the state and the construction thereof adopted by the local tribunals, and to rights and titles to things having a permanent locality, such as the rights and titles to real estate, and other matters immovable and intra-territorial in their nature and character."

Jackson v. *Chew*, 12 Wheat. 153:

This case involved a will construction as applied to real estate. The court said:

> "The rule is very much narrowed by applying the rule which has uniformly governed this court, that where any principle of law, establishing a rule of real property has been settled in the state courts,

the same rule will be applied in this court that would have been applied by the state tribunals."

See also the following:

Green v. *Lessee of Neal*, 6 Peters 291, l. c. 296;
Des Moines National Bank v. *Fairweather*, 44 S. Ct. 23;
American Mfg. Co. v. *City of St. Louis*, 39 S. Ct. 522;
Hancock v. *City of Muskogee, Oklahoma*, 39 S. Ct. 528;
Jones v. *Prairie Oil & Gas Co.*, 47 S. Ct. 338, 273 U. S. 195, 71 L. Ed. 602.

The instant case is an excellent illustration of the importance of recognizing in the federal courts the local law of a state governing the question of nuisance as it relates to a municipal sewer plant. Mr. Walter S. Dickey was the owner of the land in question in 1923 when the sewer in question was built and the characteristics here objected to first manifested. As a citizen of Missouri whose rights would necessarily be determined in the courts of that state, he was clearly subject to the rule there existing as subsequently reaffirmed in the Missouri decision specifically referred to and overridden by the Circuit Court of Appeals in this case, to-wit, *Kent* v. *City of Trenton*, 48 S. W. (2d) 571 (see petition p. 25). Subsequently he organized the W. S. Dickey Clay & Mfg. Co., respondent, under the laws of the State of Delaware and in the character of a foreign corporation comes into the federal court asking for an order of abatement, clearly denied by the state law. Is the abatable character of a municipality's

sewer plant to depend upon the question of domestic or foreign citizenship of the owner of the land affected?

It is unnecessary to carry the illustration on with reference to the constitutional revenue limitations applicable to the City.

Legal Merits.

A.

1. *The public interest is a strong factor in determining that a nuisance be classed as permanent rather than temporary.*

According to the United States Supreme Court Digest from the year 1882 down to date, and the Federal Digest for the period before that time, the subject of nuisance seems to have received comparatively little consideration from the Supreme Court of the United States, and concerning the differentiation between temporary and permanent nuisance, there seems to have been an almost total lack of pronouncement by such court. Some ruling from this court concerning that matter is of tremendous importance to thousands of municipalities throughout the country.

Four Missouri cases on this subject have already been cited and quoted from the petition, pages 25-29, to-wit:

Kent v. *City of Trenton*, 48 S. W. (2d) 571,
Hayes v. *Railroad*, 177 Mo. App. 201, 162 S. W. 266;
Smith v. *Sedalia*, 244 Mo. 107, 149 S. W. 597;
Horine v. *Peoples Sewer Co.*, 200 Mo. App. 233, 204 S. W. 735.

Petitioner further cites and quotes as follows:

Corpus Juris, Volume 46, page 804, on the subject of nuisance, says:

> "Where property is injured by permanent structures or conditions that cannot be abated because of the public interest, either party is entitled to demand that permanent damages be awarded."

Rhodes v. *Durham*, 165 N. C. 679, 81 S. E. 938: This was a case involving the pollution of a watercourse by a municipal sewer in which the court held the plaintiff entitled to recover as for a permanent nuisance and used the following language, l. c., S. E. 939:

> "Our decisions are also in support of the proposition that where the injuries are by reason of structures or conditions permanent in their nature, and their existence and maintenance is guaranteed or protected by the power of eminent domain, or because the interest of the public therein is of such an exigent nature that right of abatement at the instance of an individual is of necessity denied, it is open to either plaintiff or defendant to demand that permanent damages be awarded; the proceedings in such cases to some extent taking on the nature of condemning an easement. *Brown* v. *Chemical Co.*, 81 S. E. 463, *Id.* 162 N. C. 83, 77 S. E. 1102; *Harper* v. *Lenoir*, 152 N. E. 723, 68 S. E. 228; *Geer* v. *Water Co.*, 127 N. C. 349, 37 S. E. 474; *Parker* v. *R. R.*, 119 N. C. 677, 25 S. E. 722; *Ridley* v. *R. R.*, 118 N. C. 996, 24 S. E. 730, 32 L. R. A. 708."

Bartlett v. *Grasselli Chemical Co.*, 92 W. Va. 445, 115 S. E. 451, 27 A. L. R. 54. In this case the court says, l. c. A. L. R. 58:

"In actions against counties, cities, towns, and other municipal corporations, and railroad companies and other public utility corporations, clothed with the power of eminent domain, for injuries inflicted upon or done to real estate owned by private persons, by reason of the negligent or wrongful construction of their works, the cause of injury is generally deemed to be permanent. Of course, it is possible to conceive of extreme cases in which such corporations might injure or damage property by resort to methods and acts altogether unnecessary to the performance of their public functions, in consequence of which it would not be possible for them to obtain the right, under the power of eminent domain, to do so. In such a case, the wrongful act would, no doubt, be a nuisance, pure and simple; wherefore it could be dealt with as other nuisances. But, ordinarily, the injurious acts of such corporations are necessary in the sense above indicated, and the right to perform them, if not already acquired, could be obtained by the exercise of the power of eminent domain. In almost all cases of that kind, the acts complained of are of such character. Accordingly, it has been uniformly held by this court that the acts of such corporations, working injury and damage to private property, not involving or amounting to a taking thereof cannot be enjoined and abated as nuisances. *Spencer* v. *Point Pleasant & O. River R. Co.*, 23 W. Va. 406; *Arbenz* v. *Wheeling & H. R. Co.*, 33 W. Va. 1, 5 L. R. A. 371, 10 S. E. 14; *Watson* v. *Fairmont & Suburban R. Co.*, 49 W. Va. 528, 39 S. E. 193; *Ohio River R. Co.* v. *Gibbens*, 35 W. Va. 57, 12 S. E. 1093. Although in these decisions, as well as the decisions in similar cases in other jurisdictions, the right of recovery is based in terms upon the theory of negligent construction, the real ground of liability seems to be the constitutional provision guaranteeing compensation for private property damaged for public use.

This provision inhibits the taking of property for public use, by a company incorporated for the purposes of internal improvement, until just compensation shall have been paid, or secured to be paid, to the owner; but it does not provide for payment of compensation, or security therefor, as a condition precedent to right to damage private property for public use. It impliedly gives the right to inflict such damage, but, at the same time, it makes the corporation liable for compensation therefor. Even the guaranty against the taking of private property for such purpose, without antecedent payment of compensation or security therefor, may be waived, without losing the right to compensation. *Briar Creek R. Co.* v. *Kanawha Central R. Co.*, 70 W. Va. 226, 73 S. E. 726. When, in such cases, the injury is immediate and direct, the damages are regarded as original and permanent, and the permanency of the cause is one of the elements upon which the conclusion is based. *Smith* v. *Pt. Pleasant & O. River R. Co.*, 23 W. Va. 451; *Guinn* v. *Ohio River R. Co.*, 46 W. Va. 151, 76 Am. St. Rep. 806, 33 S. E. 87; *Blair* v. *Charleston*, 43 W. Va. 62, 35 L. R. A. 852, 64 Am. St. Rep. 837, 26 S. E. 341; *Keene* v. *Huntington*, 79 W. Va. 713, L. R. A. 1917F, 475, 92 S. E. 119."

Corpus Juris on Injunctions, Vol. 32, p. 81:

"On an application for an injunction, it is the duty of the court to take into consideration the injury or inconvenience which may result to the public in case an injunction is awarded."

Texas and Pacific Railroad Company v. *Marshall*, 136 U. S. 393, 10 Sup. Ct. 846, 34 L. Ed. 385.

2. *The judiciary may not properly compel exercise of legislative power.*

Speciously, upon surface consideration, it may be argued that the present decree makes no reference to the exercise of any legislative powers by the municipality, that the decree merely enjoins the City from discharging putrescible sewage matter into the watercourse in question. However, that decree is subject to three comments: (1) That it provides a six-months' period of suspension of the order, (2) that no matter how careful the City may be in the operation of its present plant, the same, according to respondent's own evidence, by virtue of its inherent character, will always produce an effluent containing about 40% of putrescible matter, and (3) that the method plead in respondent's petition (R. 7), and the only method testified to in the evidence as a means of modifying the character of this effluent, is that of the erection of an additional disposal plant costing, according to respondent's own engineer (R. 52), twenty-five to thirty thousand dollars. The six months of suspension of the decree is for the purpose of enabling the City to build that plant in the interim.

Viewed from the standpoint of the pleadings and the proof, the decree is undeniably in effect an alternative decree requiring (1) that the City erect the additional plant, or (2) abandon the use of its sewer system. If this statement be true, then is not the following reasoning sound:

(1) The court may have the power to prohibit absolutely the use of the present sewer system, in which event, however, the wisdom and justice and advisability of such decree must rest upon the simple alternative of sewer or no sewer whatever.

(2) The court might, if the City were already undertaking the erection of an additional disposal plant, have the power to take that into consideration as a reason why an absolute injunction against the use of the sewer system should not immediately become operative. But where no such undertaking for a new plant is afoot, then so far as the court has been moved to issue an absolute injunction subject to a six-months' suspension upon the theory that an enforced abandonment of the sewer system is not justified by the facts of the case but that the City need not abandon its sewer system because it can erect this additional plant, the court has undertaken to invade the legislative functions of the City. The whole underlying purpose and effect of the decree is to say to the City, "Erect an additional disposal plant and thus retain the right to use the present sewer system."

Surely the court may not thus indirectly properly do anything it cannot do directly. This brings us to the question whether the court has the power to require the City to build an additional sewage disposal plant.

The reports and text-books are fairly well filled with decisions concerning the circumstances under which a court may properly hold up the enforcement

of some legislative act, although even here the presumptions are all substantially in favor of the act and the court proceeds with the most extreme caution. But there seems to be practically no authority to justify a court in affirmatively requiring a city to take certain legislative action, where the power of the court so to do has been adequately challenged upon the ground of the distinction between judicial and legislative powers.

The requirements of legislative action on the part of the City for the erection of such a plant have already been referred to at page 21 of the petition.

Standard Oil Co. v. *Marysville*, 49 S. Ct. 430, 279 U. S. 582, 73 L. Ed. 856 (C. C. A. 8th Cir.). In this case the court, declining to interfere with an ordinance of the City of Marysville, Kansas, said:

> "We need not labor the point, long settled, that where legislative action is within the scope of the police power, fairly debatable questions as to its reasonableness, wisdom and propriety, are not for the determination of courts."

Corpus Juris, on Municipal Corporations, Vol. 44, Sec. 4002, page 1084:

> "Some authorities hold that the construction and maintenance of municipal drains and sewers is a corporate or municipal, as distinguished from a governmental, function; but other authorities take the view that, in the construction and maintenance of a sewer or drainage system, a municipal corporation exercises a part of the governmental powers of the state for the customary local convenience and benefit of all the people. The duty, if any, of the municipality to drain its streets and avenues is

one requiring the exercise of deliberation, judgment, and discretion and is therefore judicial in nature. Mere statutory authority to construct sewers or drains does not impose any duty to exercise such authority; and unless the duty is positively imposed by the state, the municipality has discretion to determine whether it will construct a system of drains or sewers, as well as discretion to determine the nature, extent, capacity, and cost of the system, and the method of financing its construction and maintenance. * * *''

Woods v. *The City of Kansas*, 58 Mo. App. Rep. 272, l. c. 278.

Corpus Juris on Municipal Corporations, Vol. 44, page 154:

"Ordinarily the exercise of the power (to make public improvements), to any extent deemed proper is a governmental act to be exercised under legislative discretion, and is not subject to the control of the courts."

The power of the City to construct sewers is delegated to it by the Legislature, as a legislative power under Sec. 7031, R. S. Mo. 1929, and subsequent sections.

The construction of sewer systems and sewer plants is a matter affecting the public health, and in all matters affecting the public health, the actions of the City are under the police powers of the state, and are legislative. *Haeussler Investment Co.* v. *Bates*, 306 Mo. 392, l. c. 407-412, 267 S. W. 632, l. c. 634-636.

It has been held in the following cases that a municipality is liable in damages for personal injuries sustained by workmen employed in the course of construction of sewer plants. However, both of these cases

point out the distinction between the City's governmental functions and the ministerial duties. See *Thurston* v. *The City of St. Joseph*, 51 Mo. 510, l. c. 519; *Donahoe* v. *Kansas City*, 136 Mo. 657, l. c. 666, Corpus Juris on Municipal Corporations, Vol. 43, pp. 179-182, 272, 296-308.

It must be conceded, therefore, that the decision to build a secondary plant is the exercise of a legislative function. The next question is: What right has the court to issue an order requiring of the city legislative or governmental action?

Corpus Juris, on Municipal Corporations, Vol. 43, page 299, Sec. 314:

> "The necessity and propriety of particular ordinances or regulations are primarily matters for legislative determination. Matters of mere municipal policy are not for the courts to control. The question of the necessity or wisdom of legislation within the power of a municipal corporation to enact is to be decided by the proper municipal authorities. If the municipal corporation has the power to pass the ordinance or regulation, it is neither within the province nor within the power of the court to question its wisdom or propriety. • • •"

Corpus Juris, on Mandamus, Vol. 38, page 756, Sec. 386:

> "Under general rules already stated, purely administrative functions of sewer commissioners may be enforced by mandamus. But where the duty of providing for and constructing sewers for a municipality is a quasi-judicial or legislative power involving judgment and discretion, such quasi-

judicial or legislative duty will not be controlled by mandamus, although the writ may issue to compel them to act."

32 Corpus Juris, on Injunctions, Sec. 410, p. 260:

"b. Exercise of Discretion. A court of equity will not interfere with the exercise of discretionary powers on the part of a municipal corporation or its officers so long as the limits of those powers are not exceeded, and no fraud, malice, bad faith, or improper motives are shown, for otherwise this would be an assumption by the court of the right to exercise the powers delegated only to the corporation or its officers. * * * It is only where it is clearly shown that the municipal corporation or its officers has transcended the powers vested in them, or that there has been an abuse of discretion, that a court of equity will interfere."

See also, McQuillan on Municipal Corporations, 2nd Ed., Sec. 1562, p. 325, Vol. IV; also Sec. 2871.

3. *The decree violates certain state constitutional revenue limitations that are no less binding upon the court than upon the municipality.*

The discussion under this head will here be deferred until the discussion of the same point in connection with local law.

4. *Equity forbids the expenditure sought to be imposed upon the City for the slight property damage involved.*

It is not the purpose of petitioner here to do more in connection with the petition for writ of certiorari than to call the court's attention to the fact that this

is one of the issues involved, and that aside from all other considerations, equity, it would seem, cannot justify a decree requiring an expenditure by this little community of an amount equalling what would be the accumulation of the plaintiff's damages over a period of possibly three hundred years.

B.

1. *A nuisance structure which is substantial in construction and continuing in effect and which serves the public interest is to be classed as a permanent rather than a temporary nuisance.*

In the realm of local law we are first confronted with the question of temporary or permanent nuisance. The four Missouri decisions quoted from in the petition, pages 25-29, *Kent* v. *City of Trenton*, 48 S. W. 2nd, 571, *Hayes* v. *R. R.*, 177 Mo. App. 201, 162 S. W. 266; *Smith* v. *Sedalia*, 244 Mo. 107, 149 S. W. 597; *Horine* v. *Peoples Sewer Co.*, 200 Mo. App. 233, 204 S. W. 735, would seem definitely to establish that the present sewer system, if a nuisance at all, is a permanent nuisance, first, because of the physical character of the structure and again, because it serves the public interest and may not be abated except by substantial injury to such interest.

2. *The decree violates certain state constitutional revenue limitations that are no less binding upon the court than upon the municipality.*

Only three methods, and they apparently cover the entire field of possibilities, are suggested by the

plaintiff as the means of financing the erection of an additional disposal plant. They are:

(a) Payment out of the general revenues.

(b) Payment by the issuance of bonds.

(c) Payment by special assessment.

The Circuit Court of Appeals has made such brief reference to this major question in the case that we know not which one, or more, of the three methods it deemed available to the City for the purpose of this additional construction. In three lines (R. 193) that court disposes of this question, to-wit:

> "An examination of the statutes of Missouri indicates that the financial difficulties which defendant claims would render it impossible to comply with the decree herein, are not insurmountable."

We are forced therefore to consider each one of these three methods, and what the constitutional provisions and the courts of Missouri say with reference thereto.

(a) PAYMENT OUT OF GENERAL REVENUE FUND: The plaintiff has cited Section 7226, R. S. 1929, and the language found in the body thereof authorizing the City to acquire a sewage disposal plant and to pay for the same, as indicated in the closing phrase of that section, out of the general revenue fund on a ten-year installment basis. There are various subsidiary questions with reference to this statute, such as whether it would be applicable where one disposal plant has

already been erected, which we pass by. We do not ignore, however, the fact that this statute was only enacted by the Legislature of Missouri in 1929, and that in 1923 when the sewer system in question was built and its definite inherent character established and its classification in the field of nuisance once determined, there existed no right in the City to construct such a plant out of general revenues on any ten-year installment basis.

The main objection, however, to the employment of any such method is the total absence of any such general revenue funds. This section merely enables the City to spend its money in this way if it has the money. The undisputed evidence is that the City's general revenue income is only about $6,000.00 a year. If the City were to pay for a $30,000.00 improvement in ten annual installments with interest at 5%, the first installment would have to be $4,500.00, each succeeding installment being $150.00 less than the preceding one. The undisputed evidence, however, is that the $6,000.00 of general revenue income is at the present time wholly consumed in the payment of the City's current running expense. This is fortified by the fact that at the time of trial of this case there was nothing in the City treasury and the salary bills for the preceding month of May, amounting to $881.40 (R. 102, 103) had not yet been paid. Under the law this annual revenue must be used first for the payment of the City's general operating expense, even if the City were disposed to let such items go unpaid for the purpose of erecting a

sewer (*Anderson* v. *Ripley County*, 181 Mo. 46, 80 S. W. 263, l. c. 267).

(b) BONDING POWER: Section 12, Article X, Constitution of Missouri, states the City's authorization for the issuance of bonds and is the sole governing provision on that matter except for Section 12-a thereof to which reference will be made in a moment. The City has outstanding three groups of bonds (R. 102), sewer bonds $39,000.00, waterworks bonds $100,000.00, and other bonds $3,500.00.

The $100,000.00 of waterworks bonds is the exception provided for under Section 12-a, Article X of the state constitution. That is a power which exists for certain specific purposes, that do not include any sewer plant, to-wit: "* * * of purchasing or constructing waterworks, ice plants, electric or other light plants." Furthermore, the City has practically exhausted that power in the present outstanding issue of $100,000.00 of waterworks bonds issued for the recent completion of its water plant. Even if, however, this $100,000.00 had not been issued, no power under this Section 12-a for sewer purposes could enter into consideration here under the specific holding of the Supreme Court of Missouri, in *State ex rel. Carthage* v. *Hackman*, 287 Mo. 184.

Aside from this $100,000.00 the total amount outstanding in bonds is $42,500.00, leaving, as has been pointed out in the facts stated in the petition (page 9), an unexhausted bonding power available of only $12,583.00. It is therefore obvious that even if

the court has the power to affirmatively require the city council and its officers to pass the necessary ordinances and take the necessary steps for the erection of an additional disposal plant, and to compel the voters to vote in favor of additional bonds, the same, in an amount equal to the cost of the erection of an additional plant, would be invalid under the state constitution.

(c) SPECIAL ASSESSMENT: This, it is petitioner's guess, is the one of the three methods that the Circuit Court of Appeals had in consideration in arriving at its decision. It is true that Section 7031, R. S. Mo. 1929, uses specific language authorizing the city board of aldermen to levy a tax "on all property made taxable for state purposes over the whole city, to pay for the constructing, reconstructing and repairing of such work (public sewer), which tax shall be called 'special public sewer tax,' " and it is true that Section 7038, R. S. Mo. 1929, invoked by respondent, does confer upon the City (subject to constitutional limitations) the power to build a sewage reduction device in the case of *district* or *joint district* sewers by special assessment. But this Section 7031, in so far as it thus provides for the cost of the construction of a public sewer, has been held by the Supreme Court of Missouri to be unconstitutional. This is the same provision of the statutes, discussed as Section 5969, Revised Statutes Missouri, 1899, in the case of *Union Trust Company* v. *Pagenstecher, Tax Collector,* 221 Mo. 121, 119 S. W. 1103. In the case cited the court had under con-

sideration an action of the Union Trust Company of St. Louis to enjoin the tax collector from collecting a certain special sewer tax. The lower court issued the order of injunction. This was affirmed by the Missouri Supreme Court in a decision containing this full and specific discussion of the statute in question (l. c. S. W. 1104):

> "The statute under review divides sewers into three classes, *i. e.*, 'public, district, and private sewers.' The tax allowed is only for public sewers, and these are, by the act itself, defined to be such as 'shall be established along the principal courses of drainage,' showing that the purpose was to pay out of public funds only for such sewers as were of utility to the municipality as a municipality, and not such as were especially beneficial to a particular portion of the municipality. For other than public sewers, the succeeding sections provide the manner of payment. District sewers must be paid for by special assessments against the property within the district. Rev. St. 1899, Article 5970 (Ann. St. 1906, p. 3016). Private sewers must be paid for by the individual. Rev. St. 1899, Article 5970a (Ann. St. 1906, p. 3017). So that when the three sections above mentioned, viz., Sections 5969, 5970, and 5970a, are read together it is apparent that the 'special public sewer tax' referred to in Section 5959 is a general municipal tax, and in no sense a special assessment. We do not therefore have to depend upon other indicia of a general tax, but find evidence of the character of this tax in the face of the law itself. The ordinance we have before us conforms to the statute, and we hold that it provides for a general municipal tax, although such tax is set apart for a special municipal purpose. This tax thus appears to be general in the sense of being levied upon all prop-

erty alike within the domain of the taxing authority, but special in the sense only that it is levied for a special purpose or fund. Having fixed the character of the tax provided for by this ordinance, we proceed another step, and to the vital question in this case, to which we devote the next paragraph of this opinion.

"2. Plaintiffs contend that this levy of $2.50 on the $100 valuation is in violation of Section 11, Art. 10, of our State Constitution (Ann. St. 1906, p. 283), and in this we think they are correct. This city has, under the pleadings, an admitted population of more than 1,000 and less than 10,000. By Section 11, Art. 10, of the Constitution, the limit of taxes which may be levied and collected for any one year is 50 cents on the $100 valuation. The section, so far as applicable, reads: '* * * In cities and towns having less than ten thousand and more than one thousand inhabitants, said rate shall not exceed fifty cents on the hundred dollars valuation; * * * provided, * * * for the purposes of erecting public buildings in * * * cities * * * the rates of taxes herein limited may be increased when the rate of such increase and the purpose for which it is intended shall have been submitted to a vote of the people, and two-thirds of the qualified voters of such * * * city, * * * voting at such election, shall vote therefor.' And said Section 11 concludes thus: 'Said restrictions as to rates shall apply to taxes of every kind and description, whether general or special, except taxes to pay valid indebtedness now existing, or bonds which may be issued in renewal of such indebtedness.' Under the admissions in the pleadings, and we say 'admissions' because the demurrer admits the truth of the allegations in the petition, the question of this tax was never submitted to the qualified voters of the City of Kirkwood. It is urged for the defendant that the statute (Section 5969, *supra*) does not require the

question to be submitted to the voters; but into this statute must be read the constitutional provision aforesaid (*Evans* v. *McFarland*, 186 Mo. l. c. 727, 85 S. W. 873), and before a legal tax in excess of 50 cents on the $100 can be levied the question must receive the approval of two-thirds of the qualified voters, who vote at an election held for that purpose. That such is the view of this constitutional provision is abundantly shown by the cases. *Book* v. *Earl*, 87 Mo. 246; *Lamar Water Co.* v. *City of Lamar*, 128 Mo. l. c. 221, 26 S. W. 1025, 31 S. W. 756, 32 L. R. A. 157; *State ex rel. Hill* v. *Wabash Ry. Co.*, 169 Mo. 563, 70 S. W. 132; *Aurora Water Co.* v. *City of Aurora*, 129 Mo. 540, 31 S. W. 946; *Brooks* v. *Schultz*, 178 Mo. 222, 77 S. W. 861; *Evans* v. *McFarland*, 186 Mo. l. c. 726, 85 S. W. 873; *City of Lexington* v. *Lafayette Co. Bank*, 165 Mo. l. c. 682, 65 S. W. 943; *City of Stanberry* v. *Jordan*, 145 Mo. 371, 46 S. W. 1093. Several other cases might be cited, but it is so universally held that the constitutional limit of 50 cents cannot be exceeded without a vote upon the proposition that further citation would be but to incumber this opinion.

"Counsel for defendant urges that Sections 11 and 12 of Article 10 of our Constitution undertakes to deal with annual taxes solely, and therefore do not apply; in other words, the contention is that, inasmuch as this tax is to be levied but once, and not annually, year after year, the constitutional restrictions have no force. The constitutional provision does not so read. It applies to all taxes, as will be seen by the reading of the concluding clause, *supra*. It is next urged that the statute and the ordinance can be both held to be within the terms of the Constitution, because the construction of a public sewer is within the police power of the state, and we are cited to the case of *Morrison* v. *Morey*, 146 Mo. 543, 48 S. W. 629, as lending color to this contention. That case had under consideration our law relative to levee districts and land assessments

therein. The case has no application to the case at bar. It does discuss the police power of the state, but winds up with the proposition that the amounts to be collected were not a tax, but an assessment predicated on benefits to the land. Such is not the case at bar, for here we have a tax upon both personal and real property, and not an assessment against lands for benefits accruing thereto.

"Other questions discussed in the briefs need not be discussed here, for counsel for defendant in his brief has well said: 'The real and only point in the case is whether or not the tax levied by the city in excess of the 50 cents for the purpose of building public sewers was in violation of Section 11, Art. 10, of the Constitution of Missouri.'

"From what has been said, it follows that the trial court was right, and its judgment should be, and is, affirmed. All concur."

This decision is the law of Missouri and has since been cited with approval in the following cases: *State ex rel.* v. *Christian County,* 176 S. W. 1, l. c. 3, not officially reported; *Schueler* v. *City of Kirkwood,* 191 Mo. 575, 177 S. W. 760, l. c. 762.

The reasoning of this case on Sec. 7031 applies with equal force to Sec. 7038.

Conclusion.

Because the Circuit Court of Appeals herein has erred in its decision on the differentiation between a temporary and a permanent nuisance, a matter that has apparently never had the consideration of this court, and because it has erred in invading the legislative powers of the City and in ignoring the constitutional revenue limitations governing the City, and has failed

to take an equitable view of the disparity between the injury complained of and the relief decreed, and because it has ignored the local law of Missouri including even the constitution of that state and the decisions of its Supreme Court interpreting the same, imperative reasons of public policy exist for the issuance herein by the Supreme Court of the United States of its writ of certiorari.

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CHARLES ELMORE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1932.

No. 559.

CITY OF HARRISONVILLE, MISSOURI,
PETITIONER,

VS.

W. S. DICKEY CLAY MANUFACTURING
COMPANY, RESPONDENT.

CERTIORARI TO UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT.

SUPPLEMENTAL AND REPLY BRIEF ON BEHALF OF PETITIONER.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1932.

No. 559.

CITY OF HARRISONVILLE, MISSOURI, PETITIONER,

VS.

W. S. DICKEY CLAY MANUFACTURING COMPANY, RESPONDENT.

CERTIORARI TO UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT.

SPECIFICATION OF ERRORS.

Both courts below erred:

I.

In failing to dismiss the respondent's petition in accordance with petitioner's request made at the beginning of the trial, upon the ground that the structure in question, if a nuisance at all, was a permanent nuisance and not subject to an action in equity (see Assignment of Errors I, R. 18, and trial proceedings, R. 35).

II.

In failing to sustain the objection of petitioner to the evidence of the respondent concerning methods of secondary treatment for sewage, the ground of such objection being that the right to determine the type of sewage disposal plant to be erected lay within the province of the legislative representatives of the city and beyond the province of the court to modify it (see Assignment of Errors V, R. 19, and trial proceedings, R. 49 and 50).

III.

In failing to sustain the objection of petitioner to the evidence of respondent concerning secondary treatment for the effluent from the disposal plant in question, the ground of said objection being that the character of the disposal plant was a matter for determination by the city authorities within their discretion, and not a matter for determination by the court, and that if any nuisance had been created by such disposal plant the remedy of the property owner in such case was an action for damages as for a permanent nuisance (see Assignment of Errors VIII, R. 20, and trial proceedings, R. 63).

IV.

In failing to sustain the motion made by petitioner, at the close of respondent's case, to dismiss said action, the ground of said motion being that under the pleadings and the law and the evidence it appeared that respondent had no such cause of action as it sought

to assert, that if any injury arose to respondent's land from the operation of the disposal plant in question, such injury was inherent in the use of the plant from its very beginning, constituting the same a permanent nuisance, and that the relief of the land owner for such invasion, if any, of its rights, was an action at law for damages for the diminution of the value of its land by reason of the operation of said plant, and that said plant served the general public convenience and must, as against an individual asserting property damage, be held, if held to be a nuisance at all, a permanent nuisance, for which equity provided no relief, but for which the land owner was remitted to an action for damages as for a permanent nuisance; and further, upon the ground that under the petition and the evidence it appeared that respondent sought an order modifying the present disposal plant, notwithstanding that such an order was beyond the jurisdiction of the court, and notwithstanding that respondent's evidence failed to show that petitioner was financially able to construct such a supplementary plant, or that under the condition of its finances and the limitations of the Constitution of the State of Missouri it had the financial means or the power to build such a secondary plant (see Assignment of Errors XI, R. 20, and trial proceedings, R. 70).

V.

In entering a finding and decree in favor of the respondent which was erroneous for the following reasons (see Assignment of Errors XIII, R. 21, and Decree, R. 15):

A. (Omitted here.)

B. (Omitted here.)

C. (Omitted here.)

D. (Omitted here.)

E. (Omitted here.)

F. (Omitted here.)

G. Because the decree in effect required that petitioner erect an additional and supplementary disposal plant, and thus invaded the legislative powers and discretion of petitioner.

H. Because equitable relief thus awarded respondent was unsupported by the pleadings and the evidence which showed that the structure in question, if a nuisance at all, was a permanent nuisance, for any resulting damage from the operation of which the only proper action was an action at law by the owner of the property affected for original damages.

I. Because the decree ignored the financial and constitutional limitations upon the petitioner preventing its compliance with the requirements in the decree for the erection of a supplementary plant.

J. Because the decree ignored the preponderating public convenience and necessity served by the structure in question when the complaint against the same was based upon mere property damage.

K. Because the decree inequitably required of the petitioner an expenditure of from $25,000.00 to $40,000.00, when the property damage complained of by respondent amounted to only $100.00 a year.

SUPPLEMENT TO STATEMENT OF FACTS.

The Imhoff Tank.

Imhoff tanks have been in use in Missouri about ten years, although they have been in use in Germany and other states of the United States somewhat longer. They are generally recognized as a marked improvement over the old septic tank method of disposal (R. 65, 76, 52). A statement of the design and operation of an Imhoff tank can best be followed in connection with a study of Defendant's Exhibit B, pages 2 and 3 (R. 161 and 163).

The method of operation is briefly this (R. 77-80). Take page 2, Exhibit B (R. 161), which starts at the top of the page with the distribution manhole, into which from points east beyond the top of the sheet has been brought the City sewage by the intake pipe. Out of the bottom of this manhole lead three lines of pipe running west. The longer one known as the bypass leads to another manhole just north of the west end of the tank. This bypass normally is kept closed and performs no function in the sewage disposal (R. 78, 80, 88). The two shorter pipes are always open and lead west to and enter the east end of the concrete constructed Imhoff tank, discharging near the top of the tank, one line into its north settling chamber and the other into its south settling chamber. The tank, inside measurement, is about 23 feet deep and 20 feet long by 21

feet wide, and is divided into three rectangular compartments running the east and west way of the tank, two side compartments each 20 feet long by 8 feet wide, called the settling chambers, and a central compartment 20 feet long by 4 feet wide, called the digestion chamber. However, as is seen from cross section AA (R. 163), these three compartments toward the bottom of the tank all open into one another.

The Construction and Operation of the Settling Chambers.

The first intake of sewage fills the tank to the level of the two tank intake pipes indicated by the small circles on the cross section AA. Thereafter the sewage continues to flow into the east end of the tank, and in the same volume but of a different character to overflow at the west end of the tank in a knife blade stream over a weir into a trough which carries it to the collection manhole just north of the tank.

When the sewage enters the east end of the tank's two settling chambers, it becomes part of the very large body of sewage imperceptibly moving toward the west end. The solids in this practically still sewage immediately begin settling to the bottom of the tank and because of its sloping sidewalls, cross section AA (R. 163), are deposited finally directly under the middle or digestion chamber. Further impeding the westward movement of the sewage is a baffle which runs across each of the settling compartments near the west end. This is a solid wall reaching above the water line but extending downward only

a foot or two. The surface sewage does not flow over this but flows under it after losing much of its solid matter. That liquid sewage which comes under the baffle gradually rises and as before described passes in a knife-blade stream over the weir. Thus of the sewage that entered only the liquid part, with possibly very fine particles of matter held in suspension, particles so fine as to be hardly perceptible to the eye, flows over the weir on its way to the collecting manhole north of the tank.

The Digestion Chamber.

We have already seen from cross section AA (R. 163) how the solids are precipitated by the sloping walls of the settling chambers into the bottom of this great concrete hopper and directly under the middle or digestion chamber. This deposit, called sludge, accumulates here and ferments in which process it gives off gases that rise through the liquid and escape into the open air from the surface of this digestion compartment, which, by the way, unlike the two side compartments has no flow escape over the west end of the tank. Since the gas tends to rise perpendicularly and since the sludge level is kept down to a level from which perpendicularly rising gas would either pass up directly to the surface of the digestion chamber, or, coming in contact with the inner surface of the outward sloping walls of the digestion chamber (R. 163) be forced inward in order to get upward, all the gas from the fermenting sludge rises to the surface of the digestion chamber. It is the contents of this digestion chamber that con-

stitute the most noxious part of the sewage, a part that never gets into the watercourse.

Sludge Removal.

Of course, there must be a method of removing decomposed sludge from time to time from the digestion chamber. For this purpose an eight inch iron pipe closed at the top and supported from the sides of the digestion chamber is suspended perpendicularly over the central and very deepest part of the tank, cross section AA (R. 163). Its lower end is open and rests on flanges coming within about one foot of the bottom of the tank. About three-fourths of the way up this pipe but still well below the water line is a connecting eight inch pipe leading horizontally out of the tank to a point of discharge over the sludge bed, which is just west of the tank. This last pipe has a gate valve ordinarily kept closed. At intervals of two or three months (R. 79), however, as sludge has accumulated in the bottom of the tank under the digestion chamber this valve is opened by hand for a short time and by the simple hydraulic pressure of the tank contents the sludge is forced from the tank to the sludge bed. Then by hand the gate valve is closed. In the sludge bed this deposit is exposed to the air and the liquid in it is drained off through a filtering process underneath shown on the left-hand part of cross section BB (R. 163) west of the tank. The sludge remaining in this sludge bed eventually becomes a kind of gray powder and is shoveled off from time to time.

Secondary Treatment.

This is a primary treatment of the sewage which removes from it about sixty per cent of the putrescible matter (R. 51, 77, 86). To add to this a secondary treatment would be to take the effluent now discharged from the plant and, before discharging it into some natural drain, subject it to further purification by an activated sludge plant, a sand filter or a trickling plant (R. 50). Such a plant of combined primary and secondary treatment would accomplish a total removal of about ninety per cent of the putrescible matter (R. 95), leaving still about ten per cent to be carried away by natural drainage.

Difficulties of Imhoff Tank Inherent.

Respondent's proof was to the effect that, while an Imhoff tank very properly serves for the primary treatment for sewage, it should be supplemented by a plant for secondary treatment; that it is not possible to operate the Imhoff tank of the City of Harrisonville so that its discharge will not pollute Town Creek; that the failure to remove from the sewage more than sixty per cent of putrescible matter thus leaving forty per cent to be carried off into Town Creek is inherent in the character of such a tank even when properly operated; that this was true from the very first day that the tank was built and put into operation and that nothing more could have been expected of it (R. 52).

Respondent's Farm Improvements.

The house, silos, barns and farm improvements referred to by respondent are all in another and larger pasture across on the east side of the railroad track (R. 39), having an independent water supply of its own (R. 38) and merely connected at one point with the pasture in question by gates and a pass over the railroad tracks (R. 43). The statement that the pasture drained by Town Creek is the heart of the farm is not justified by the facts. The total acreage of the farm on both sides of the railroad tracks is about 300 acres (R. 36), of which only about 100 acres on the west side of the tracks are affected by the sewer discharge (R. 61, 181). The land affected may be identified (R. 36) on Plaintiff's Exhibit No. 1 (R. 141) as "Kunze 18 A" (meaning 18 acres) and "F. Deacon 14.71 A" and "M. Deacon 31.64 A." None of this land on the west side of the tracks bears any improvements except the fences (R. 43, 59) and a pond fed by a spring (R. 62). For a good water supply in this west pasture respondent has this pond and the stream above the sewer outlet, neither of which is affected by the sewer discharge. Respondent says the cattle do not drink the water of Town Creek below the outlet (43).

Value of the Land.

The total value of the 100 acres affected, without any pollution of the stream, was only $60 per acre (R. 115-117). What part of that value was destroyed by the sewer plant can only be determined from the figures

on rental value. Respondent's figures indicated a destruction of one-half of the value (R. 42). Petitioner's evidence indicated no destruction of rental value (R. 116, 117, 138). The court found a destruction of rental value of $100 per year for 100 acres or $1.00 per acre which represents one-quarter of the total rental value since after allowance for this loss of rental value the land still rented for $3.17 per acre (42).

Construction of Sewer Plant Not Defective.

Except for the reference, direct or implied, that it was defective construction for the city to omit to include a secondary disposal plant, there is no finding in the decree or either of the court opinions that the construction was in any manner defective.

ISSUES OF THIS REVIEW.

To sharpen the issues deemed most important upon this review, petitioner for the purpose of such review concedes the point which among other matters it contested below, to-wit, that the sewer system and disposal plant in question do materially increase the contamination of the water course in question and do constitute a nuisance.

Petitioner further concedes that in so far as the decree in question may be directed at any careless or negligent operation of the existing sewer system and disposal plant, petitioner may not be heard to complain thereof. The observation is incidentally dropped, however, that any instances of that kind shown in the evidence are old cases and are no longer occurring. But primarily it must be observed that the decree goes beyond any such matter of negligent operation and contemplates the required erection of a secondary and additional disposal plant.

The issues here urged as of sufficient importance to warrant the attention of this court are those set out in the petition for writ of certiorari and in the brief in support thereof, to-wit:

Matters of General Law.

(With Segregated Citations.)

I.

The nuisance in question is permanent as distinguished from temporary and is not subject to be

abated by court order, (1) because of its fixed, inherent, substantial physical character, and (2) because the damage wrought by it is a mere property damage which was compensable in a money judgment, whereas enforced abandonment of the sewer plant would seriously adversely affect the public welfare.

New York City v. *Pine,* 185 U. S. 93, 22 S. Ct. 592, 46 L. Ed. 820 (1902).

Kent v. *City of Trenton, Missouri,* not officially reported, 48 S. W. 2nd 571, l. c. 575 (1931).

Hayes v. *Railroad,* 177 Mo. App. 201, 162 S. W. 266 (1913).

Smith v. *Sedalia,* 244 Mo. 107, 149 S. W. 597 (1912).

Horine v. *People's Sewer Co.,* 200 Mo. App. 233, 204 S. W. 735 (1918).

Bollinger et al. v. *American Asphalt Roof Corporation,* 224 Mo. App. 98, 19 S. W. 2nd 544 (1929).

Rhodes v. *Durham,* 165 N. C. 679, 81 S. E. 938 (1914).

Bartlett v. *Grasselli Chemical Co.,* 92 W. Va. 445, 115 S. E. 451, 27 A. L. R. 54 (1922).

Blankenship v. *Kansas Explorations, Inc.,* 325 Mo. 998, 30 S. W. 2nd 471 (1930).

Texas and Pacific R. R. v. *Marshall,* 136 U. S. 393, 10 Sup. Ct. 846, 34 L. Ed. 385 (1890).

City of Cape Girardeau v. *Hunze,* 314 Mo. 438, 284 S. W. 471 (1926).

Sussex Land and Live Stock Co. v. *Midwest Refining Co.,* (C. C. A. 8th Cir., 1923), 294 Fed. 597, 34 L. R. A. 249.

Corpus Juris on Nuisance, Vol. 46, p. 775, Sec. 385, also p. 804.

Corpus Juris on Injunctions, Vol. 32, p. 81.

Corpus Juris on Municipal Corporations, Vol. 43, p. 956, Sec. 1734.

Among the authorities supra petitioner calls especial attention to that of New York City v. *Pine not cited in the first brief herein.*

II.

The judicial power may not command affirmative legislative action, and when such legislative action is not proceeding voluntarily the court may not take such legislative action into consideration as a factor in determining the issuance of its order enjoining a municipality from the use of its existing public sewer system.

Standard Oil Co. v. *Marysville,* 49 S. Ct. 430, 279 U. S. 582, 73 L. Ed. 856 (C. C. A. 8th Cir.).

Woodson v. *The City of Kansas,* 58 Mo. App. 272, l. c. 278.

Haeussler Investment Co. v. *Bates,* 306 Mo. 392, l. c. 407-412, 267 S. W. 632, l. c. 634-636.

Thurston v. *The City of St. Joseph,* 51 Mo. 510, l. c. 519.

Donahoe v. *Kansas City,* 136 Mo. 657, l. c. 666.

Corpus Juris on Municipal Corporations, Vol. 43, p. 299, Sec. 314, also Vol. 44, p. 154, also Vol. 44, p. 1084, Sec. 4002.

Corpus Juris on Mandamus, Vol. 38, p. 756, Sec. 386.

Corpus Juris on Injunctions, Vol. 32, p. 260, Sec. 410, also p. 250, Sec. 391.

McQuillan on Municipal Corporations, 2nd Ed. Vol. IV, p. 325, Sec. 1562, also Sec. 2871.

III.

Even did the judicial power include such control over legislative action, it might not operate in the present instance because of the state constitutional revenue limitations governing the petitioner which, under the undisputed facts as to petitioner's financial condition, leave it financially unable to comply, whether the resources for compliance be sought

(a) in the City's general revenues, or

Constitution of Missouri, Sec. 11, Article X.

Union Trust Co. v. *Pagenstecher,* 221 Mo. 121, 119 S. W. 1103.

Anderson v. *Ripley Co.,* 181 Mo. 46, 80 S. W. 263, l. c. 267.

(b) in the City's debt-making power, or

Constitution of Missouri, Sec. 12, Article X and Sec. 12-a, Article X.

Comor v. *City of Nevada,* 188 Mo. 148, 86 S. W. 256.

State ex rel. v. *City of Willow Springs,* 183 S. W. 589.

State ex rel. v. *University City,* 320 Mo. 451, 8 S. W. 2d 13.

State ex rel. v. *Hackman,* 287 Mo. 184, 229 S. W. 1078.

(c) in the City's power of special assessment.

See authorities, *supra.*

(d) In the City's power to levy a "special public sewer tax," a method newly differentiated by respondent from the general classification, special assessment.

See authorities, *supra,* also:

Small v. *Partway Auto Supplies, Inc.*

Sacks v. *Legg,* 219 Ill. App. 144, l. c. 147.

Lamar Water and Electric Light Co. v. *City of Lamar,* 128 Mo. 188, 31 S. W. 756.

State ex rel. v. *Town of Columbia,* 111 Mo. 365, 20 S. W. 90.

Brooks v. *Schultz, Tax Collector,* 178 Mo. 222, 77 S. W. 861.

IV.

Beyond all of the considerations above, equity does not approve, at least under the circumstances of this case, an enforced expenditure of possibly $30,000.00 to cure a continuing property damage of $100.00 per year.

New York City v. *Pine,* 185 U. S. 93, 22 S. Ct. 592, 46 L. Ed. 820.

Sussex Land & Live Stock Co. v. *Midwest Refining Co.,* (C. C. A. 8th Cir. 1923) 294 Fed. 597, 34 L. R. A. 249.

Kansas v. *Colorado,* 206 U. S. 46, 27 S. Ct. 655, 51 L. Ed. 956.

McCarthy v. *Bunker Hill and Sullivan Mining Co.,* (C. C. A. 9th Cir. 1908) 164 Fed. 927, 92 C. C. A. 259.

Parker v. *Winnispiseogee Cotton and Woolen Co.,* 67 U. S. 545, 17 L. Ed. 333.

Bliss v. *Washoe Copper Co.,* (C. C. A. 9th Cir. 1911) 186 Fed. 789, 109 C. C. A. 133.

Corpus Juris on Nuisances, Vol. 46, p. 775, Sec. 385.

Matters of Local Law.

Points I and III above are doubly deserving of the attention of this court because they involve matters

of local law with which the ruling herein of the learned Circuit Court of Appeals is in direct conflict. That both Points I and III involve matters of local law is the effect of the following citations.

Swift v. *Tyson,* 16 Peters 1.
Jackson v. *Chew,* 12 Wheat. 153.
Green v. *Lessee of Neal,* 6 Peters 291, l. c. 296.
Des Moines Nat. Bank v. *Fairweather,* 44 S. Ct. 23.
Hancock v. *City of Muskogee,* 39 S. Ct. 528.
Jones v. *Prairie Oil & Gas Co.,* 47 S. Ct. 338, 273 U. S. 195, 71 L. Ed. 602.
Livingston v. *Jefferson,* Fed. Cas. No. 8411.
Smith v. *Stasco Milling Co.,* 18 Fed. 2d 736.
Sullivan v. *American Manufacturing Company of Massachusetts,* (C. C. A. 4th Cir. 1929) 33 F. 2d 690.

From this last citation *a case of nuisance* on account of the fumes and vapors emitted by a factory in South Carolina, petitioner quotes as follows (l. c. 693):

> "We agree with the learned judge below and with counsel for defendant that plaintiff's right to recover must be determined by the law of South Carolina. The right of action is essentially local. See *Livingston* v. *Jefferson,* Fed. Cas. No. 8411. Also it arises out of the ownership and enjoyment of real property. It is governed therefore by the law of the state where the property is situate, *Smith* v. *Stasco Milling Co.,* 18 Fed. 2nd 736."

REBUTTAL.

Right of Sewage Disposal.

As a preliminary matter, and because some inferences of respondent's argument are apparently to the contrary, (Resp. 1st B. 6), let it be said that petitioner makes no claim of a right to dump sewage as it pleases and to leave the property owner thus damaged without any recourse. Petitioner's claim is that the *remedy* was one for original damages that belonged to the original land owner. Respondent acquired the land two years later with full knowledge of the existence of the situation now complained of.

Legal administration in our country follows the historical analogy of the order of the development of English procedure, and, in search of a remedy for a particular legal wrong, first scans the remedies afforded in an action at law, and passes into the realm of equitable remedies only after exhausting the possibility of an adequate remedy in the first classification.

Condemnation.

Respondent serves notice that it will contend that under Sections 7023, 7079 and 7090, R. S. Mo., 1929, petitioner could have acquired a right to use the watercourse in question, as it is using it, by condemnation.

No such suggestion of this kind occurs in the original petition or in any of the proceedings of the trial

court. The point of those proceedings is to *prohibit* petitioner from making use of the watercourse for the discharge of sewage effluent without further purification by a secondary disposal plant; not to *enable* petitioner to make use of such watercourse without that further disproportionate and legally impossible expense. Petitioner, on the contrary, has consistently held to the theory that if any nuisance had been created the same was merely one of property damage and that the original property owner had thereby been possessed of a right of action for damages caused by a permanent nuisance, which for all practical effects got to the same result to be had by the condemnation now pointed to by respondent.

Has not respondent heretofore urged a right in real estate ownership that is so high and inviolate that it transcends even the public service and convenience of the sewer system in question, and can refuse damages and demand instead an abatement of the present discharge? And, is not any present recession by respondent from that position to one of substitution of the claim that petitioner may proceed or might have proceeded to condemn the watercourse in question, a substantial abandonment of the fundamentals of the decree here in question?

Moreover, while we bear in mind that condemnation is merely certain machinery for working out the principle that public requirements override private property rights, subject only to compensation therefor, we may question whether the particular machinery now

brought forward by respondent is adequate under the circumstances here existing to carry into effect such principle.

The first of these condemnation statutes, *supra*, Sec. 7023, deals with steps "for the prevention of the introduction of contagious diseases in the city." There is no evidence that the condemnation of this watercourse will prevent any contagious diseases in the City.

Again, observe that this statute proposes to "condemn and hold for the city * * * all necessary lands for * * * sewer carriage and outfall * * *." Is the City expected to buy by condemnation one hundred acres of pasture land which even now, despite the sewer, rents for $3.17 per acre? Or, is not the City more properly merely liable for such damage, if any, as brought the land value down to the point where it would rent for only $3.17 per acre?

And again, if the City exhausted its bonding power in building the sewer it did build, then was it not, at that time at least, without funds to acquire this one hundred acres of land, and was not the situation at that time crystallized as one in which the property owner at that time might recover from the City original damages for such part of the value of the one hundred acres as was destroyed by the presence of the sewage effluent in the watercourse?

Section 7079, R. S. Mo., 1929, *supra*, authorizes no taking of property outside of the City, and if there be any merit in the doctrine of *ejusdem generis*, has no application to condemning a right to pollute a stream.

Section 7090, R. S. Mo., 1929, *supra,* in no way enlarges the right of the City to condemn, but refers merely to the method of payment for such condemnations as are permitted by the foregoing statutes.

These three sections of the statutes just referred to relating to cities of the fourth class are quite different from the express sewer provisions, Sections 6872-6898, R. S. Mo., 1929 (Sections 8354-8371, R. S. Mo., 1919), referred to in the case of *City of Cape Girardeau* v. *Hunze*, 314 Mo. 438, 284 S. W. 471, in which the Supreme Court of Missouri discusses the right given by such sections of the statute applicable to cities of the *third* class to condemn the use of streams for sewer purposes beyond the corporate limits, and announces a doctrine of riparian rights as affected by municipal sewage disposal which gives liberal consideration to the public interest.

But even if Section 7023, R. S. Mo., 1929, *supra,* authorizes such a condemnation as is contended for by respondent, yet an action for damages, as contended for by petitioner, is the equivalent thereof, a thing recognized in the construction *of this statute* by the appellate courts of Missouri.

Barton v. *City of Odessa,* 109 Mo. App. 76, l. c. 83:

> "The right of cities under the law to quarantine against infectious disease does not include the right to seize private property without compensation; and as said seventh count is for damages sustained by reason of the seizure and use of plaintiff's hotel without compensation, it states a good cause of action."

Respondent's Citations Upon the Subject of Permanent or Temporary Nuisance.

Respondent's citation of *Mining Company* v. *City of Joplin,* 124 Mo. 129, 27 S. W. 406, is subject to the following comment:

The trial court perpetually enjoined the City of Joplin, Missouri, from building a public sewer over the plaintiff's land. The Supreme Court of Missouri set aside this decree and *ordered the plaintiff's petition in equity dismissed.*

Incidentally the court uses this language pertinent to petitioner's Point II:

124 Mo. l. c. 138:

> "But it is for the city council to determine the question whether the public welfare requires or makes the sewer necessary or expedient. With that question the courts have nothing to do, for the law has confided it to the judgment of the city council."

Again the court uses language easily subject to simple paraphrasing to conform to petitioner's claim that under the facts of this case the affected land owner had an action for damages:

124 Mo. l. c. 140:

> "The plaintiff can assert and have all its rights determined in the condemnation proceedings appealed by it to the circuit court. There is therefore no case here calling for equitable interference."

Respondent's citation of *Swanson, et al.*, v. *Bradshaw,* (Missouri Appeals, 1916) 187 S. W. 268 (not officially reported) is the report of an action between two private parties over a continuing practice on the part of the defendant of disposing of garbage and dead animals on his property. It involved no consideration of a permanent, structural nuisance.

Respondent's citation of *Scott* v. *City of Marshall,* 223 Mo. App. 596, 14 S. W. (2d) 694, involved almost wholly questions of the sufficiency of the evidence to support the judgment and decree. The parties did not raise, and the decision did not pass upon, any question of permanent or temporary nuisance or any other question involved in this present review.

Respondent's next citation, *Baltimore & Potomac R. R. Co.* v. *Fifth Baptist Church,* 108 U. S. 317, 2 S. Ct. 719, 27 L. Ed. 739, apart from the issues of this case, is interesting because it involves a nuisance in the City of Washington almost on the doorstep of the court, and deals with a controversy between a railroad company engaged more or less in very essential tasks of operation, and a church congregation. The church complained that the noise and smoke from the engine house adjoining its house of worship had damaged it.

However, the case makes but a humming-bird contact with the issues here. It was a controversy be-

tween private parties and the question was primarily *whether a money judgment for damages* for the maintenance of a nuisance should be sustained, or whether the railroad company, having obtained the authorization of Congress to operate in the City of Washington, was above the ordinary rules of law applicable to nuisance and therefore not required to answer, even in damages, for the nuisance maintained. The pleadings, the evidence, the judgment, and the opinion, all ignored any question of permanent or temporary nuisance. If the case has any weight in decision of the issues here it would seem to be in petitioner's favor, inasmuch as the remedy chosen and sustained was an action at law for damages.

A case not cited by respondent but coming closer to respondent's contentions, and to which petitioner feels constrained to call attention, is that of a subsequent lawsuit between the same parties, *Baltimore & Potomac R. R.* v. *Fifth Baptist Church*, 137 U. S. 568, 11 S. Ct. 185, 34 L. Ed. 784. The church, following its victory in the first decision, filed a second suit for damages accruing over a subsequent period, and then filed a third suit for damages accruing over a still further subsequent period. In the third suit the railroad company sought to have the trial court instruct the jury that in determining their award of damages to the church they should "take into consideration" the amounts of the former two judgments in favor of the church, and this, in effect, the court refused to do. This court affirmed that third judgment. And this might seem to be a holding by this court that the rail-

road engine house was regarded as merely a temporary nuisance.

But even in this case the court in concluding its opinion points out that it is not the structure that is complained of, but the wrongful use of the structure. These wrongful uses were recurring acts of the defendant. In our Harrisonville case, however, the structure is susceptible of but one use, the handling of sewage, and is practically self-operating, and of such an inherent character that even under perfect attention by petitioner in the operation thereof it will always run a discharge of the objectionable forty per cent of putrescible matter. In other words, the substance of the nuisance complained of in our case is not recurring, separate acts on the part of the City in the use of the structure, but is the structure itself in the substantially self-operating performance of its single function.

However all this may be, it is certain that in none of these Baltimore & Potomac Railroad cases did the court dip into equity and issue any order of injunction.

Edmondson v. *City of Moberly*, 98 Mo. 523, 11 S. W. 990, next cited by respondent deals merely with a denial of the trial court to the plaintiff of any right of action at law against the City for damages for discharging its sewage into a small stream near plaintiff's land within the city limits. The Supreme Court reversed this ruling and sent this action at law back for trial. No one undertook to plead, or prove or

decide therein that the court should enjoin the use of the sewer plant.

Up to this point in this *seriatum* examination no case cited by respondent has granted an injunction and no case has discussed the difference between a permanent and a temporary nuisance, or made firm contact with any of the issues here for review. Nor does respondent from this point on by way of citation again enter the State of Missouri, except for the citation of *Bollinger* v. *American Asphalt Roof Corporation,* 224 Mo. App. 98, 19 S. W. (2nd) 544. This was an action at law for money damages only. It was between private parties involving no consideration of any benefit by the alleged nuisance to the public welfare. The distinction is well made there between a structure, the factory buildings in question, and the things complained of done in or about that structure. Since the latter was the ground of complaint the nuisance was properly held to be a temporary rather than a permanent one. The case, however, contains an interesting review of the law of Missouri on the subject of permanent or temporary nuisance which seems to justify the following lengthy quotation:

Bollinger, et al., v. *American Asphalt Roof Corporation,* 19 S. W. (2d) 544, l. c. 546, 547:

> "Appellant assigns as error the refusal of the court to give its requested Instruction C, as follows: 'The court instructs the jury that the nuisance complained of, if any, was a permanent one and not a continuing one, and existed with the knowledge of the plaintiff more than five years

before the filing of the action, and therefore your verdict must be in favor of the defendants and against the plaintiff.'

"This action was commenced on September 30, 1926. The evidence shows that appellant's plant was completed and operations begun therein on October 1, 1920; and appellant contends that it has continued to operate in substantially the same manner ever since that date, save for some improvements in method. From this appellant argues that, whatever the damage to plaintiffs' property, it was fully clear and evident from the first day of operations, and that the nuisance then created, if any, was of a permanent nature, and that any right of action therefor was barred by Section 1317, Rev. St. Mo. 1919, prior to the bringing of this action.

"The reported cases make a clear distinction in principle between those in which the erection or construction becomes a nuisance from the manner in which it is used, and those in which the erection is a permanent structure, the natural and evident effect of which from the first is to create a nuisance, though the effects may be gradual. Of the latter sort are the cases cited by appellant of *Smith* v. *Sedalia*, 152 Mo. 283, 53 S. W. 907, 48 L. R. A. 711; *Id.*, 182 Mo. 1, 81 S. W. 165; and *Id.*, 244 Mo. 107, 149 S. W. 597, which involved a city sewer, and *De Geofroy* v. *Merchants' Bridge Terminal R. Co.*, 179 Mo. 698, 79 S. W. 386, 64 L. R. A. 959, 101 Am. St. Rep. 524, which involved an elevated steam railway on a public street, upon which plaintiff's land abutted. In these cases it was held that the right of action accrued at the date of the original construction, and the statute of limitations ran from that date. In the case of *Howard County* v. *C. & A. R. R. Co.*, 130 Mo. 652, 32 S. W. 651, an action for damages to plaintiff's bridge was filed in the year 1893. In holding that the claim was not barred

by the statute of limitations, the Supreme Court said:

"'While the evidence tended to prove that the obstructions thrown into the stream by defendant's servants in 1885, changed the current of the stream, so that in the fall of that year the water began to flow against the pier, it also tended to prove that no actual or material injury was done to the pier until within a period of five years next before the suit was brought; and the court so found, and held that plaintiff's action was not barred. In this, we think, the court committed no error. While there is some conflict between the American cases on this subject, the rule sustained by the great weight of authority seems to be, that when by wrongful acts, a permanent nuisance is created, and the injury therefrom is direct, immediate, and complete, so that the damages can be immediately measured in a single action, the statute will begin to run from the erection of the nuisance. On the other hand, when the injury, as in this case, is not complete, so that the damages can be measured, at the time of the creation of the nuisance in one action, but depends upon its continuance and the uncertain operation of the seasons, or of the forces set in motion by it, the statute will not begin to run until actual damage has resulted therefrom.'

"In the case of *Powers* v. *St. Louis, I. M. & S. R. R.*, 158 Mo. 87, 57 S. W. 1090, defendant had constructed a canal whereby the river channel was changed, causing the current to suddenly turn in an acute angle. As a result, plaintiff's land was gradually washed away and flooded. The canal was completed in 1868, and the suit was begun in 1895. The court distinguished the case from the Howard County case, *supra*, and held that the *cause* of the damage was complete and visible in 1868, and held

that no damages were recoverable. In the course of its opinion, the court said:

" 'They practically claim that this is a continuing nuisance, and that the damages are apportionable, and can be sued for separately, until eternity, as often as a further quantum of damage is done. This is untenable. The evidence shows, and common sense demonstrates, that the damage has been and must be gradual, and that it began as soon as the permanent canal was built, and must continue until a bend is formed which will stop the wearing away of the bank. This began in 1868. At that time C. T. Tullock owned the land, * * * until 1882, and all the time (fourteen years) this process of gradual wearing away was going on. He made no complaint. The cause of action to complain and to recover full compensation for all damages, present and prospective, was therefore barred as to Tullock when he sold the land to the plaintiffs in 1882. They took the land in this condition, used it, saw the process of wearing away going on * * * from 1882 to 1895 (thirteen years), and made no complaint, and at the expiration of twenty-seven years from the time the cause of action accrued, and the damages had become apparent and susceptible of computation, they sued the defendant, and recovered nearly half as much as damages as they paid for the whole tract of 537.52 acres of land.

" 'The claim is clearly barred by limitation. The original construction of the canal was unworkmanlike, defective, and negligent, and necessarily produced the results complained of, but the time has long since passed when an action therefor could be maintained. The structure was permanent, the damage apparent and measurable, and could only be recovered in a single action. It is in no proper sense a continuing nuisance, where the damages are apportionable.'

"In the case of *Hayes* v. *St. Louis & S. F. R. R. Co.*, 177 Mo. App. 201, 162 S. W. 266, defendant built a railroad embankment which caused an overflow on plaintiff's land. The opinion reviews the cases on the subject, and says:

" 'It is stated thus in 29 Cyc. 1254: "Where a nuisance is of such a permanent character that a single recovery can be had, including the whole damage, past and future, resulting therefrom, there can be but one recovery; but where the nuisance is of a continuing (abatable) nature, each continuance gives rise to a new cause of action, and successive actions may be maintained for the damages accruing from time to time"; and, again, at page 1260: "Statutes limiting the time within which actions may be brought apply to actions for damages for nuisances, and where the nuisance is of a permanent character the period runs from the time when the injury was done or the structure complained of erected; but where the nuisance is a continuing one an action for injuries from the continuance may be brought after the lapse of more than the statutory period since the creation of the nuisance, although in such case the recovery is limited to damages for the statutory period preceding the commencement of the action." * * *

" 'Then it should be borne in mind that it is the character of the source or cause of the injury as to being permanent or temporary rather than the character of the injury itself that determines to which class it belongs. In 29 Cyc. 1154 these terms are defined thus: "A permanent nuisance is one of such a character and existing under such circumstances that it will be presumed to continue indefinitely, and as a rule consists of some building or structure. Nuisances consisting of acts done, or particular uses of property, may be properly termed continuing when they are of such a character that they may continue indefinitely, or on the other

hand may be discontinued at any time." The permanent injury, a cause of action for which is single, and accrues once for all, may be permanent either from the inherent nature of the injury itself, as going to the destruction of the estate or its beneficial use, or from the nuisance or cause of the injury being permanent. The effect is permanent whether arising from a single act or from a constantly recurring series of acts from the same permanent cause.'

"In the light of these decisions it seems clear that the erection of defendant's plant for manufacturing purposes cannot be said to have been a nuisance *per se*, or such as in itself was notice or evidence that it would be operated and maintained in a way to constitute such a nuisance. There is nothing in the character of the structure which would in any way prevent it from being maintained indefinitely without offense to anyone. The things complained of are due to the manner of its use."

In the case of *City of Oklahoma City* v. *West*, 155 Oklahoma 63, 7 Pac. (2d) 888, cited by respondent, we have a case which it must be conceded is at least partially in point. We reserve the discussion of it until later herein.

Respondent cites two cases from Arkansas, the first of which is *Jones* v. *Sewer Improvement District No. 3*, 119 Ark. 166, 177 S. W. 888. As an introduction to the discussion of this case, we quote the following excerpt therefrom italicizing certain words that contain the key to a special condition of the Arkansas law and the problem confronting Arkansas courts in this class of cases:

177 S. W. l. c. 889:

> "In the case at bar the plaintiffs instituted actions in the circuit court for *the taking and damaging of their property* by the sewer improvement district, and recovered judgment thereon. • • •
>
> "In the circuit court the plaintiffs were allowed to recover damages according to this rule; that is to say, they were entitled to and allowed to recover damages for the land taken and damaged by the construction of the sewer. The damages allowed in such cases are those which result from the proper construction of a sewer."

The court found, however, that after the sewer was constructed it was not maintained and operated so as to avoid a nuisance. And it is this matter of maintenance and operation at which the equity suit involved in this decision is aimed.

The trial court dismissed the bill of complaint for want of equity and the appellate court reversed this ruling, and directed the chancellor below to enjoin that one of the defendants "whichever now have control of the operation and maintenance of the sewer system, from operating and maintaining it so as to create or continue a nuisance on the lands of plaintiffs." This case is subject to the following comment:

It dealt with a septic tank and with chemical treatment incidental to a septic tank operation, that chemical treatment a thing to be carried out by the defendants. The case makes the distinction that the court is looking not at the structure, but at its operation:

177 S. W. l. c. 890:

> "The mere fact that sewers are of permanent construction does not render the nuisance, if any, permanent also. As we have already seen, the nuisance in the present case arose from faulty operation and maintenance of the sewer. It was therefore of a continuing or recurring nature, and the action of plaintiffs was not barred."

Of course in our case the Imhoff tank, as before stated, is practically self-operating; does not contemplate any chemical treatment, and even under perfect operation will reduce the putrescible matter only sixty per cent. This concrete structure is connected with the sewer mains which are constantly receiving sewage deposits, and, it would seem clear, is in itself a structural nuisance.

The attention of the court in this Jones case, however, seems to be concerned but casually with the distinctions between permanent and temporary nuisance and to be absorbed with the problem of whether the City is beyond any attack, either in law or equity, for any improper discharge of its sewage. The discussion on the one hand is one of corporate as distinguished from governmental powers, and on the other hand of the constitutional prohibition against damage to private property for public use without just compensation. The court is struggling apparently between these two legal premises with the peculiar problem imposed upon it by the law of Arkansas, to-wit, that it may not render a money judgment against the City for a tort and that therefore its only

road out for protecting the complainants is in an action in equity. Observe this quotation:

177 S. W. l. c. 891:

> "As we have already seen, this court has uniformly held that neither municipal corporations nor local improvement districts nor their officers may be sued at law for tort; but it does not follow that in a proper case they may not be enjoined from creating a nuisance or be required to abate one already created by them. Indeed, this affords ground for equitable relief in actions like this."

How, says the reader, are we to reconcile this theory of no money judgment for tort with the fact that money judgments of a character have, according to the case, already been rendered against the defendants, and, likewise money judgments in the case of *McLaughlin* v. *City of Hope*, 107 Ark. 442, 155 S. W. 910, cited in this Jones case? The key to the answer is, in the words italicized in the opening quotation from this case. The Arkansas court in the McLaughlin case had worked out the theory that the City, by constitutional requirement was obliged to pay in the way of condemnation for private property taken or damaged for public use; that therefore the court could render the money judgment against the City in a situation where the facts could be squeezed in under a theory of condemnation. In that *McLaughlin Case*, 155 S. W. l. c. 912, in considering somewhat similar facts and sustaining a money judgment the court said:

> "Since the city's action in constructing its sewer system so as to turn the sewage into said branch indicates an intention to acquire a permanent right to continue to so use it and pollute the stream, the damages to the owner should be assessed upon that basis and as though the city were proceeding to acquire it under its power of eminent domain."

Coming back to the Jones case, the court finds that the plaintiffs there have already made a recovery and exhausted their right under this somewhat elastic conception of condemnation; that that theoretical condemnation result, however, contemplated a sewer system properly maintained and operated, whereas the system after construction was apparently not so maintained and operated. But what could the court do under that circumstance? That constituted a tort for which under the Arkansas rule the court could render no money judgment against the defendants, public bodies. Legal remedies therefore being exhausted, the court turns to equity.

The courts of other states, particularly Missouri, suffer no such embarrassment in returning a money judgment against a municipality for the erection of a nuisance, either permanent or temporary, and in fact the present decree includes a money judgment against the City.

Corpus Juris, on Municipal Corporations, Vol. 43, page 956, Section 1734:

> "Where a municipal corporation creates or permits a nuisance by non-feasance or misfeasance,

> it is guilty of tort, and like a private corporation or individual, and to the same extent, is liable for damages in a civil action to any person suffering special injury therefrom, irrespective of the question of negligence; and such liability cannot be avoided on the ground that the municipality is exercising governmental powers."

The text cites a vast number of authorities in support of this proposition, among them two federal authorities, *Seattle* v. *Lloyd's Plate Glass Insurance Co.*, 253 Fed. 321, 165 C. C. A. 103, and *Winona* v. *Botzet*, 169 Fed. 321, 94 C. C. A. 563, 23 L. R. A. (N. S.) 204.

Respondent's second Arkansas citation, *Sewerage District No. 1* v. *Black*, 141 Arkansas 550, 217 S. W. 813, clears up whatever remaining doubts there may be that the foregoing analysis correctly accounts for these Arkansas decisions. This was another case in which the court, 217 S. W. 814, perpetually enjoined the city, "from so operating, managing and controlling the disposal plant, as to constitute a nuisance to the plaintiffs."

Observe the reasoning upholding equitable relief:

217 S. W. l. c. 817:

> (Our italics) "The complaint stated facts which if true showed that appellants had created and were maintaining a nuisance. The appellees after stating such facts then averred that appellants, *without exercising the right of eminent domain, were taking and damaging the property of the appellees without due process of law.*

"It might be stated in passing that it was developed in the proof at the hearing that one of the appellees *had sought to recover against appellants damages in an action at law which appellants successfully resisted.*

"The complaint further alleged that the acts complained of as constituting the nuisance were continuous and recurring and appellees had no complete and adequate remedy at law. * * *

"It is well settled that under our constitution (Article 2, Section 22) private property cannot be taken, appropriated, or damaged for public use without just compensation therefor (Arkansas citations).

"If the appellants were contending that the exigencies of the public health of the City of Siloam Springs required that they appropriate appellees' property to the use of the public for sewerage purposes under the authority of Section 5664 of Kirby's Digest, and that in the use of such property by appellants for such purposes the appellees would necessarily be damaged, then appellants would be correct in their contention. Because, if that were the case, appellants would have a complete and adequate remedy at law (more Arkansas citations). But such is not this case."

The rule in Arkansas therefore is that a money judgment may not be rendered against a city in an action at law upon a finding that the city has committed or is committing a tort, including nuisance, and that the property owner's only avenue of recovery against the city in an action at law is upon the theory that the city in effect has acquired or damaged the property in question by a condemnation. Where, however, the plaintiff is blocked in such an action by cir-

cumstances inconsistent with the theory of condemnation, then the procedure of Arkansas turns to equity.

Thus the rigidity of the rule of Arkansas preventing any action at law in tort against a city has forced a compensation therefor in a liberalization of the acceptance of what constitutes a temporary or recurring nuisance and justifies equitable interference.

Morse v. *City of Worcester,* 139 Mass. 389, 2 N. E. 694, cited by respondent, provides very little guidance on any question in the case at bar for the reason that the appellate court merely passes upon a demurrer to the plaintiff's petition which was framed in the most general terms and all of the allegations of which the court points out, must for the purposes of its ruling, be accepted as true. The plaintiff there complained of the discharge by the city of sewage into a stream upon which plaintiff owned a mill site, and recited that the city "carelessly, negligently and unnecessarily so constructed said sewers and drains, and carelessly, negligently and unnecessarily so discharged the waters therefrom, and so negligently omitted to take reasonable and proper precautions and methods in the construction of said sewers and drains, and purification of said waters," that the objectionable condition was created. The plaintiff's petition was a bill in equity to abate a nuisance, and on the mere issue of the sufficiency of the petition, was upheld. The petition was one directed more against negligence than anything else, and even in so far as it touched the subject of nuisance, no one

in the case seems to have raised the point about the difference between a permanent and a temporary nuisance, or any of the other points in issue here.

2 N. E., l. c. 296:

> "The bill alleges negligence in constructing the sewer and in failing to use reasonable precautions to purify the sewage. We cannot anticipate what negligence may be proved. Negligence, in this as in most other cases, is largely a question of degree. If the plaintiff shows, that in constructing the sewer, or in adopting the brook to its use as a sewer, the defendant did the work in an improper manner, this bill can be maintained. * * * But to prevent misunderstanding we add that if the only mode of preventing pollution of the river is found to be by the adoption of an extensive system of purification, independent of the construction of the sewer, requiring the taking of large tracts of land, we must not be understood as implying that it is within the duty or the power of the defendant to do this."

Respondent's next citation is *Chapman* v. *City of Rochester,* 110 N. Y. 273, 18 N. E. 88. The court enjoined the city from continuing a nuisance of the following character: The plaintiff owned four acres of land watered by a stream of pure water which he had collected into an artificial basin to use for domestic purposes as well as the propagation of fish and for an ice supply. The city thereafter constructed sewers discharging into the watercourse in question and polluting the same, causing injury to the plaintiff's health as well as his property. Not only did this case

involve injury to health, but apparently nobody raised in this case any question about the difference between a permanent and a temporary nuisance, or any other question involved upon this review.

Respondent's next citation is another Arkansas case, although a decision of the federal court for that district, *Carmichael* v. *City of Texarkana*, 94 Fed. 561. This is a suit in equity against the City and others for the abatement of a nuisance alleged to have been created by the discharge of sewage from the sewer system of the city onto premises of complainants, and to recover damages caused to complainants thereby. Complainant lived in the State of Texas on the Arkansas line on a homestead of some forty-five acres. A brook crossed said land for a distance of 200 yards fed by springs of pure water and was the water supply of complainant and his family and his herd of dairy cattle.

The City of Texarkana later constructed a sewer system discharging its sewage into the creek in question just above complainant's property on the Arkansas side of the state line. The co-defendant water company furnished the water for this sewer and the individual co-defendants maintained sewer connections with it. This sewer greatly damaged complainant's real estate and interfered with the health and enjoyment of himself and family in the use of the property. The case passes merely upon a demurrer attacking the sufficiency of the petition. The court dismissed the action

as to the co-defendant water company and individual co-defendants. Even as to the defendant city, the court makes this ruling:

(l. c. 575:)

> "The demurrer is sustained on the ground that the plaintiffs in this suit can only recover against the city such damage as they show they have sustained up to the time the decree is rendered, and not for prospective damages, for the reason that if an injunction is granted, it cannot be assumed it will be violated, and that other damages will be sustained; and for the reason, if a restraining order is finally refused, then the bill should be dismissed for want of jurisdiction in the court, and the plaintiffs remitted to a court of law for such damages as they may have sustained. In short the jurisdiction of the court in this case rests upon the fact that the plaintiffs are suffering from a continuing nuisance created by the city."

Except for such inferences as may be drawn from the foregoing quotation the court apparently has not canvassed the question of permanent or temporary nuisance and that question seems not to have been raised, altho the court considers at length the matter of riparian rights. This is all doubtless due to the fact that the suit was filed in Arkansas and that the counsel and doubtless the court held the conception of the law on such subjects which we have heretofore in the discussion of two cases of the Supreme Court of Arkansas noted as peculiar to that state.

Respondent's next citation passes over into Oklahoma, *City of Tecumseh* v. *Deister,* 112 Okla. 3, 239 Pac. 582. This was a simple suit at law for damages for discharging sewage into a stream flowing over plaintiff's land. Plaintiff sued for $5,000.00 damages and secured a *verdict for $500.00* which the Supreme Court of Oklahoma sustained. The case passes on none of the issues here for review.

Likewise, respondent's citation, *Harbison* v. *City of Hillsboro,* 103 Ore. 257, 204 Pac. 613, misses contact with any of the issues in review here. The case was one of *a money judgment at law* against the city for the maintenance of a sewer nuisance.

In respondent's citation of *Missouri* v. *Illinois and The Sanitary District of Chicago,* 180 U. S. 208, 21 S. Ct. 331, 45 L. Ed. 493 (1901) we have a case in which the petition to enjoin the City of Chicago from dumping its sewage into the Mississippi River by an artificial canal was held sufficient upon demurrer. The allegations were those of great injury that would be done the health of thousands of people in Missouri. That is the basis of the court's ruling upon the sufficiency of the allegations of the petition (180 U. S. l. c. 241). It is a far cry from such a case to one in which the injury is a mere property damage and at that only $100 per year.

Another of respondent's citations, *Attorney General ex rel.* v. *City of Grand Rapids*, 175 Mich. 503, 141 N. W. 890, is one in which the general public welfare was arrayed upon the side of the complainant. This was an action instituted against the maintenance of a *public* nuisance proven to be destructive of the health of whole communities.

City of Oklahoma City, Oklahoma, v. *W. C. West,* 155 Okla. 63, 7 Pac. (2d) 888. This citation is respondent's main reliance. The statements of the court in this case are in point in respondent's favor, but petitioner believes that a close scrutiny of the case will reduce very substantially its weight as a precedent for decision of the issues here.

First, be it observed, the action is *one at law for damages* and not one in equity for an order of injunction. We quote the following:

7 Pac. (2d) l. c. 889 (our italics):

> "The nuisance complained of was the turning of unpurified sewage into the river at Oklahoma City to the damage of plaintiff as a riparian owner, and the petition contained the usual allegation that the nuisance *could be abated by the expenditure of money,* and it was alleged that the damage would continue until abatement. The petition contained an admission that a prior action had been settled by a stipulation which allowed a certain sum as damages sustained from the nuisance up to April 15, 1928; judgment for that sum having been rendered pursuant to the stipulation.

It was also alleged that the settlement had been made on the promise of the city to abate the nuisance by purification of the sewage, and alleged that a purification plant erected by the city failed to purify the sewage and that the nuisance still continued to the plaintiff's damage. The answer was a general denial and a plea of the statute of limitations.

"*The plea of the statute of limitations was presented upon the theory that the nuisance was permanent, and the contention that the nuisance was permanent was grounded on an alleged failure to charge any negligence in the adoption or execution of the plan for the construction of the sewers or the disposal plant that had been built.* In addition, it was urged at the trial, that, since the nuisance was permanent, the former recovery, although the action was on the theory of a temporary nuisance, was a bar to recovery in the present action. Unless the nuisance should be held to be permanent, neither contention, that of the statute of limitations nor of the bar of the former action, is sound." • • •

(l. c. 890:)

"We have repeatedly held such a nuisance to be temporary under the rule that, *where a nuisance can be abated by the expenditure of money or labor it shall be considered temporary.* • • •"

Petitioner challenges this expenditure of money or labor test of a temporary nuisance. There probably is no structure including the Pyramids that cannot be removed, given sufficient money and time.

And the court launches into a discussion of the old contention that since the City was authorized to construct this sewer it has committed no nuisance, and

of course the court demonstrates the unsoundness of that contention. Thereafter follows this language:

(l. c. 891):

> "But in the present case what is being done is something that was not authorized, and a right to damages does not require the sanction of a constitutional provision. (Prohibition against the taking of private property for public purpose without just compensation.) The damages are recoverable for what was and what still is a common law tort, a nuisance. We point this out because, if it should be conceded that the right to damages should be based upon the constitutional sanction, it would involve the admission that the nuisance was authorized, *and, if what was a nuisance should be authorized, of course it would be held to be permanent.* It will be found, however, that the real ground of liability in the case is that the nuisance was unauthorized *and the reason why it was unauthorized is a sufficient reason why it should not be considered permanent, a lack of necessity for its commission.*"

Here, it seems to us, is the error of the court's reasoning. True, possibly, if a nuisance is held to be authorized it might by that fact become fixed in character as permanent. It is not logically necessary, however, in denying that the nuisance was authorized, to pass to the conclusion that necessarily it is temporary in character. Following the court's own reasoning on this subject of authorization, the absence of authorization merely leaves the character of the nuisance no longer definitely established as permanent, but leaves the character of the nuisance yet to be ascertained. There are still factors to be considered in arriving at

the decision of its character as permanent or temporary, to-wit, whether the nuisance is a structural nuisance, fixed and permanent, and also whether its continuance will work only slight harm that can be fully compensated for in money, whereas its abatement would work a public hardship.

Elsewhere in this opinion it is true the court disposes of the first matter to its own satisfaction upon the theory that it is not the structure which works the damage, but the use of the structure, and therefore the fixed and substantial character of the structure has nothing to do with determining whether the nuisance in question is a permanent nuisance. We cannot follow the court in that view of a structural nuisance. If it is a sewer plant with connections into the houses and stores of an inhabited community and is practically self-operating, as in the case at bar, we think it entirely fair to say that the structure itself, including of course its normal operation, is the nuisance.

But however that may be, the court in this Oklahoma case apparently gives not a moment's consideration to the question of public welfare or of financial ability on the part of the City to so modify its system as to be unobjectionable. Possibly the court upon the facts in that case is correct in its statement (l. c. 893), "it is *easily* abatable." If so, then upon that ground alone is there an absolute differentiation between the Oklahoma case and that at bar, destroying all value in the Oklahoma case as a precedent here.

Along this same line, note this excerpt:

(l. c. 891:)

> "The authority for the commission of the nuisance, irrespective of the adoption of a plan by the municipality, must be grounded in a permission to commit the nuisance found in the act, or in an *inability* to do the act without committing the nuisance."

In our case, the City is authorized to construct a sewer system but it suffered under the "inability" to do so in the manner demanded by respondent. Apparently it did everything it should have done except to build an additional and secondary disposal plant, a thing it could not do because in constructing the sewer system and plant that it did construct, it thereby exhausted its bonding power and financial resources for that purpose (R. 74, 83). For Harrisonville it was a case of inability, and a case where the nuisance is not "easily abatable." That is, not easily abatable if any consideration is to be given to financial resources, and no good reason appears why financial resources should be ignored.

The court frequently throughout this opinion becomes engrossed with the old question referred to in so many of the old cases with reference to whether constitutional or statutory authority to do or erect the thing that constitutes the nuisance puts the City beyond the ordinary operation of the law of nuisance. For instance, the court says:

(l. c. 892):

> "If the legislature expressly authorizes an act which must inevitably result in public injury, what would otherwise be a nuisance may be said to be legalized; but if they authorized an erection which does not necessarily produce such a result, but such result flows from the manner of construction or operation, the legislative license is *no defense.*"

Petitioner complains of this consideration of the subject upon the ground that the thing here for decision is not whether the City has a defense or not, but what is the nature of the plaintiff's remedy. It is most interesting to note that the remedy pursued by the plaintiff in this Oklahoma case was an action at law for damages.

This petitioner is not interested in whether some fine theoretical defense could be made to this charge of nuisance upon the mere ground that petitioner was authorized by law to construct a sewer and that if respondent was injured thereby it was simply the latter's misfortune. We have admitted throughout this case that if the structure in question constituted a nuisance the City was liable to the property owner originally damaged in full property damages; and we are going further, for the purposes of this review, and admitting that the structure is a nuisance. We are advancing here considerations with reference to the remedy, considerations which appear not to have been raised or considered by the Oklahoma court in its discussion of temporary and permanent nuisance.

Even this Oklahoma decision is in conflict with three previous holdings of its own, to-wit:

Mangum v. *Sun Set Field,* 73 Okla. 11, 174 Pac. 501;

Page v. *Oklahoma City,* 129 Okla. 28, 263 Pac. 448; and

City of Ardmore v. *Colbert,* 52 Okla. 235, 152 Pac. 603.

This previous decision of the Supreme Court of Oklahoma, Mangum vs. Sunset Field, favorable to petitioners here, occupies practically one full page of Corpus Juris on Limitations, Vol. 37, p. 889, where as a note the opinion is quoted from in full. That it has been overruled by respondent's citation of City of Oklahoma City vs. West, supports petitioner's contention that the law on this subject which affects such large numbers of people is in an unsettled state and that the situation warrants an expression from this court.

Respondent makes the point in its supplemental brief that the Missouri five year statute of limitations has run on any claim based upon permanent nuisance. The sewer system was constructed in 1923. Respondent with complete knowledge of the situation acquired the property in 1925. The claim for damages for permanent nuisance belonged to the original owner. Respondent never did own that claim. On August 31, 1928, (R. 2) more than five years after the beginning of the sewer system early in 1923 (R. 74) respondent filed this action on the theory of a temporary nuisance. Even had the right of action for damages caused by a

permanent nuisance belonged to respondent, the latter's neglect to file suit thereon within the statutory period is no justification for an action in equity on the theory of temporary nuisance.

For affirmative material on this question of temporary or permanent nuisance, we refer to our former brief, pages 25 to 29, inclusive, and pages 38 to 41, inclusive and to *New York City* v. *Pine,* 185 U. S. 93, 22 S. Ct. 592, 46 L. Ed. 820, and to *Sussex Land and Live Stock Co.* v. *Midwest Refining Co.,* (C. C. A. 8th Cir., 1923) 294 Fed. 597, 34 L. R. A. 249. For further affirmative material petitioner refers to the voluminous notes and citations accompanying the following text from Corpus Juris on Nuisances, Vol. 46, p. 775, §385:

> "In determining the propriety of equitable relief against nuisance, the court will consider, in the exercise of its discretion, the equities presented in the particular case in which its interference is asked, and the injuries which may result to the public by granting the injunction as well as the injuries to be sustained by complainant if it be refused. So an injunction will not ordinarily be granted where the erection complained of has a tendency to promote the public convenience to an extent outweighing the private inconvenience resulting therefrom; where it is necessary to the community generally; or where an injunction would cause serious injury to an individual or the community at large, and a relatively slight benefit to the party seeking such relief; but under such circumstances the person complaining will be left to his remedy at law or merely awarded damages. If the injunction would have the effect of greatly injuring or inconveniencing the public it may be re-

fused, even though, as against defendant, complainant will be entitled to it."

Judicial Interference With Legislative Functions.

Respondent's original brief herein cites no authorities on this matter and confines itself to a short comment upon the facts. Respondent's first contention on this point is apparently that the decree does not require, as claimed by petitioner, the erection of an additional disposal plant. Respondent says, (Resp. B. page 12):

> "The expert engineer testifying for plaintiff below named sand filters, trickling filters, or activated sludge as possible types of treatment which would eliminate the nuisance in question" (R. 50-51).

The inference of this statement is apparently that these types of treatment shown in the proof as those that would eliminate the nuisance in question do not call for a secondary plant. Such inference, however, is directly contrary to the facts. Sand filters, trickling filters and activated sludge are merely three different types of a secondary refining plant. Respondent's own engineer testifying on that point said, (R. 51, bottom of page):

> "Effluent from any of the plants that I have mentioned, that is, activated sludges, sand filters and trickling filters, could be such that it could be discharged into Town Creek without the creation of a nuisance or any condition unfitting the creek for stock water. The outflow from the plant would be relatively clean and without offensive odors.

> This activated sludge plant, or sand filters, or trickling filters, is what is known as a secondary, or final type of plant, and this present Imhoff tank, with some changes in the system of baffling can be used in connection with such a secondary plant. The cost of adding such a secondary system would be $25,000.00 to $30,000.00."

The testimony of petitioner's engineer (R. 95) is in harmony with that above quoted.

Respondent refers to the recommendation of the state health engineer (R. 63 and 64). We quote the following from those pages of the record:

> "The Harrisonville plant is in an Imhoff tank with a sludge dry-bed known usually as primary treatment. This is simply a settling out process of certain solids in the sewage which is usually followed, if necessary, by a secondary treatment where a further stabilization of sewage takes place. An Imhoff tank only settles out a certain per cent of putrescible matter in the sewage and the effluent therefrom will always contain organic matter which is not entirely stabilized, and if in sufficient quantity will pollute a water course. • • • We recommended additional treatment in a report, I think in 1925, to the City of Harrisonville."

Respondent next advances the claim that the decree does not require the City to build an additional disposal plant. Says the respondent,

> "Any number of methods are available to the City to comply with that injunction; it may pipe its sewage elsewhere, or utilize any of the several successful methods in common use for so reducing the sewage that the outflow will be non-putrescent. It may even abandon the sewer system and return

to the method of private disposal by each householder if it feels that it must choose between that and maintaining *unnecessarily* a system which dumps the entire sewage accumulation of the City upon the private property of the respondent."

First as to the suggestion of piping this sewage elsewhere. Can it be piped to the next largest stream in that vicinity grandiloquently called "Grand River"? This stream respondent's own witness, somewhat incidentally, remarks is two miles distant (R. 55). And respondent's failure to develop in the proof any suggestion that this small town pipe its sewage that distance indicates that respondent entertains no serious thought of this method of sewage disposal. But where else? One thing is certain, sewage runs down hill; and another thing is certain, sewage once collected must be discharged some place. Town Creek, which rises within the city limits of Harrisonville and winds through the town, is the natural course of drainage of that territory (R. 73, 94). Petitioner has carried this sewage approximately a quarter of a mile beyond the city limits and has refined it to the extent of 60% and, in a place distant from any human habitation, has discharged the effluent at the low point of drainage in a piece of wooded pasture land, bearing no improvements but the fences.

But it is scarcely candid for respondent to suggest that the injunction in question does not contemplate petitioner's erection of a secondary disposal plant. That is what respondent referred to in its trial court petition wherein it complained that the Imhoff tank

was merely a primary disposal plant and that "by reason of the failure and refusal of the City to construct, maintain and operate proper and adequate disposal facilities for its sewage, a nuisance is created" (R. 8, paragraph 13); and it is what it had in mind in its prayer when it prayed, "that the defendant City of Harrisonville be given a reasonable time to construct and place in operation a sufficient and adequate sewage disposal plant" (R. 10); and this secondary plant is the only method offered by respondent in its proof as a practical method of relief. Note the testimony of respondent's engineer, *supra.*

And the trial court in its decree interpreted in the light of its opinion and the pleadings and the evidence has in mind a secondary plant:

> "3. The court finds that it is unnecessary for the defendant City of Harrisonville to discharge raw or partially treated sewage into the said watercourse upon plaintiff's land, and that the defendant City may by use of reasonable means available to said defendant City abate the said nuisance, and that six months' time from the date of this decree is a reasonable time within which the said City may abate said nuisance" (R. 15).

The court could only make that finding from the evidence, and the evidence referred only to a secondary plant.

The decree further says:

> "Provided, however, and it is further ordered, adjudged and decreed, that the said defendant be and it is hereby given a period of six months

from the date of this decree in which to abate the said nuisance by such adequate and effective method or methods as the said defendant City may select to prevent, cease and determine the discharge of putrescible sewage matter in the said watercourse in, on or above said plaintiff's land" (R. 16).

The trial court's opinion reads:

"The evidence shows that the City in an effort to dispose of its sewage constructed an Imhoff tank. Admittedly this structure can only dispose of approximately 60% of the raw sewage turned into it. Concededly 40% was carried without treatment and discharged into Town Creek. It further appears that said Imhoff tank was not efficiently operated so that the maximum benefits could be realized. The court finds from the evidence that the sewage after passing through the Imhoff tank, as a primary disposal plant, *could without great expense be further treated in a secondary plant, and that by such treatment* the sewage of the city could be reduced or disposed of to a maximum of 90%. This would reduce the sewage for practical purposes and would have the effect to abate the nuisance" (R. 180, our italics).

The Circuit Court of Appeals took the same view in its opinion which we quote as follows:

"By the installation of a supplementary tank the sewage disposal system of said defendant may be so improved that the effluent therefrom would be comparatively harmless and inoffensive (R. 186). • • •

"In this case, however, with the installation of a supplementary tank the condition of the creek will tend to correct itself" (R. 190).

Respondent's next suggestion that if the petitioner does not want to build, or is unable to build a secondary disposal plant, "it may even abandon the sewer system and return to the method of private disposal by each householder," is so abhorrent to one's sense of the requirements of community life that it scarcely requires further comment. Because respondent, the owner of this pastureland, suffers a damage at the rate of $100.00 a year for which the City can easily reimburse it, respondent demands that, if necessary to prevent that $100.00 damage, a community of two thousand people abandon a sanitary system which the evidence discloses is absolutely essential (R. 96, 72, 73).

And all the while, under the law of Missouri, there was the protection accorded the original owner of the land of the right to a money judgment for his total damages past and contemplated. And plaintiff acquired its property two years after the nuisance had been in operation and that original damage done and with full knowledge of the situation (R. 42).

Respondent has done little to refute the petitioner's point that the erection of a secondary disposal plant particularly in the council proceedings authorizing it and making financial provision for it, involve the exercise of legislative powers and that such powers are beyond the affirmative direction of the judiciary.

Financial Powers of the City.

Respondent's original brief makes the statement that in such a case as this the financial powers of the

City are not a matter of concern to the court, and in support of that statement points to the cases previously cited in connection with the matter of nuisance. It is true that in several of those cases the court issued an order of injunction against the City and in some of those under circumstances which might imply the expenditure of further money by the City, but in not one of those cases was the point raised or considered that the City would experience any financial difficulty in compliance with the order of injunction.

In respondent's supplemental brief we find respondent listing four separate methods by which it claims the City could raise the necessary funds to comply with this order which may require an expenditure of as much as $30,000.00. They are:

(a) Bonding power;

(b) Special public sewer tax;

(c) Special assessments;

(d) General revenue.

(a) Bonding Power: Petitioner is unable to see that respondent has advanced the course of the argument in any degree under this heading. That the evidence discloses that the City has outstanding against its bonding power the sum of $42,500, testified to by the witness in that portion of the record quoted by respondent to be $42,500.00 is exactly in accordance with petitioner's original statement and contention herein (P. 9), that being the difference between the bonding power authorized, $55,-

083.00, and the bonding power remaining, to-wit, $12,583.00.

Petitioner's statement to the trial court about its legal power to make a levy beyond the constitutional limitations for the purpose of paying a judgment against it entered upon an action *ex delicto* is, despite respondent's reference at this point to it as inconsistent, in strict accordance with the law. *Connor* v. *City of Nevada*, 188 Mo. 148, 86 S. W. 256 (1905); *State ex rel. Poole* v. *City of Willow Springs*, (Missouri Court of Appeals, 1916, not officially reported), 183 S. W. 589; *State ex rel. Pyle* v. *University City*, 320 Mo. 451, 8 S. W. 2nd 73.

(b) Special Public Sewer Tax: Respondent quotes Section 7031, R. S. Mo. 1929, originally quoted in petitioner's petition (P. 11) which provides that "public sewers shall be established *along the principal courses of drainage*, at such points, to such extent, of such dimensions and under such regulations as may be provided by ordinance, etc." A glance at the map of Harrisonville, Defendant's Exhibit B, page 1, record 160, shows that that is exactly what was done in the present instance. Respondent recurs to this section of the Missouri statutes because it includes an authorization for levying a "special public sewer tax," "on all property made taxable for state purposes over the whole City."

This is the section under review in the case of *Union Trust Co.* v. *Pagenstecher, Tax Collector*, 221 Mo. 121, 119 S. W. 1103, heretofore cited by petitioner

(P. 12, 31, 35, 52 and 53), and the fact remains that under such decision of the Missouri Supreme Court the section of the statutes referred to is limited in its application by Section 11, Article X, of the Constitution of Missouri, which provides that the City is limited to a tax levy of fifty cents on the $100.00 valuation, with an exception to which we will refer in just a moment.

First, since from this supplemental brief of respondent some doubt is cast upon the following matter of fact, let it be noted that the evidence shows (R. 101, 102, 112 and 113) that the City's annual revenue, with no deductions for uncollectible items (which are considerable), is $6,120.59, all of which is required for the City's ordinary current expenses.

Respondent endeavors to construe the Union Trust Company case as one limited to the simple proposition that the defect in the proceedings therein was the failure to submit the proposition for the tax to a vote of the people. Even if that be true (and we desire shortly to point out some serious question with reference to that view), we face the barriers of these observations.

(1) The court in the case at bar, by its decree, does not say that the *officers* of the City shall submit such a proposition to a vote.

(2) Nor does it say that, if, in the event of such an election, the proposition fails of the requisite two-thirds vote, the decree will not be enforced.

The requirement is addressed to the City, not to individual officers, and it runs into these manifest constitutional obstacles of the invasion by the court of the City's power of legislation; (a) in that the city council would resolve that such a proposition should be submitted and (b) that the people would exercise their legislative privilege to say, "No."

Surely it is impossible to conceive of the court making a valid requirement of the City and at the same time recognize that the requirement was one subject to popular approval by two-thirds vote. Are we to assume that the decree contemplates that the city council shall undertake the legislative requirement of submitting the proposition to the voters, and that the election shall be held, and that when an adverse result of the vote is ascertained there no longer remains any life in the decree, and that it was never contemplated by the court that there should? Decrees of courts are not issued upon the contingency of their being set aside by popular vote.

But even if the decree is to be upheld on such a theory there still remains this query: Do we understand respondent to say that the people shall subject themselves to a tax four or five times the normal revenue tax in order to pay for this improvement? If respondent replies that it expects to pay only a small part each year of the total cost of the improvement, and that therefore there is no necessity for raising in any one year revenue of $36,000.00 ($6,000 general revenue and $30,000 cost of new sewer plant), we come face

to face with the fact that we have shifted over into deferred payments, and must take recognition of Section 12 of Article X of the State Constitution under which, as we have seen above, the City's additional debt-making power is limited in round figures to $12,000.00, an amount wholly insufficient.

We stated above that there was an exception to the tax that might be levied under Section 11. It is of course under that exception that respondent seeks to exercise the power of this statute with reference to a special public sewer tax. The exception to the general revenue constitutional limitation to which it refers is the language which reads:

> "For the purpose of erecting public buildings in counties, cities, or school districts, the rate of taxation herein limited may be increased when the rate of such increase and the purpose for which it is intended shall have been submitted to a vote of the people and two-thirds of the qualified voters of such county, city or school district voting at such election, shall vote therefor."

Respondent jumps to the conclusion that the phrase "public buildings" includes a secondary sewage disposal plant. These sewage disposal plants are simply open-air filtering processes, or spraying processes sunk in the ground. They are not carried on in buildings or edifices, and could not be included under the term "public buildings" which doubtless refers to such improvements, as a city hall or jail or fire station house or hospital, etc. Perhaps respondent is heard to say that we can, however, thus interpret the term upon

the very authority of this Union Trust Company case, in view of the fact that the court therein takes special note of the fact that the constitutional provision recites that "for the purposes of erecting public buildings in * * * cities, * * *, the rate of taxation herein limited may be increased when the rate of such increase and the purpose for which it is intended shall have been submitted to vote of the people, and two-thirds of the qualified voters of such * * * city * * * voting at such election shall vote therefor"; and calls attention to the fact that the city in that case submitted no such proposition for a vote, and of course received no such two-thirds approval. Even so, that is not equivalent to saying that such a sewer is recognized as included in the constitutional term, "public buildings." After the court's construction of the statute and its determination that the tax in question was really a general tax, no matter what it was called, and that therefore the statute was governed by this Section 11, Article X of the State Constitution, there remained only to the city in that case, for whatever it might be worth (and petitioner contends that it was worth nothing), the chance to claim the right to come in under the "public buildings" clause of this section of the constitution. It was a simple matter for the court to cut the City's head off on any claim of that kind by simply pointing out that the City had taken no action for the two-thirds vote. That is not equivalent to saying that had the City taken such action it would be conceded by the court as valid under the constitutional

section on the theory that a sewage disposal plant comes under the description, "public buildings."

Such a plant does not come within the terms of such description. Respondent's authority of *Battle* v. *Wilcox,* 128 S. C. 500, 122 S. E. 516, certainly makes no such holding. The thing there held to be a public building was a hospital. The Supreme Court of Massachusetts in the case of *Small* v. *Partway Auto Supplies, Inc.,* (154 N. E. 521), holds that a building means a structure with walls and usually covered by a roof. To the same effect is the decision in *Sacks* v. *Legg,* 219 Ill. App. 144, l. c. 147, in which the court held that a building is a fabric or edifice such as a house, church, or the like, designated for the habitation of man or animals or for the shelter of property.

See also:

Howell v. *Boston Academy of Notre Dame,* 130 Mass. 209.

Van Baman et al. v. *Gallagher,* 182 Pa. 277, 37 Atl. 832.

Concord v. *Morgan,* 74 N. H. 32, 64 Atl. 725.

In our own state, in the discussion of this very section we have strong ground for saying that the term, "public buildings" does not include some part of a sewer system. The Supreme Court of Missouri in *Lamar Water & Electric Light Co.* v. *City of Lamar,* 128 Mo. 188, 31 S. W. 756, reversed its own decision in the case of *State ex rel.* v. *Town of Columbia,* 111 Mo. 365, 20 S. W. 90, but in both opinions it is taken for granted that the term "public buildings" has a

special or limited meaning which, is not synonymous with public improvements generally. In these cases the court had up the proposition as to whether or not the city could incur indebtedness for a waterworks, etc., even by a two-thirds vote. In the first case the court held that it could not do so where the amount necessary to retire the indebtedness authorized under Section 12, Article X of the State Constitution, would require a tax levy in excess of the general provision of fifty cents on the $100.00 valuation. And in the second case the court holds that that is error, and that this indebtedness authorized under Section 12 is in addition to the rate authorized for general revenue levy under Section 11. Concerning the question of public buildings, both cases draw attention to the fact that Section 11 makes an exception for public buildings, but that payment for a waterworks could not come under that phrase. In the first case the court said, l. c. S. W. 93:

> "When a county, city or town has levied the highest rate allowed by Section 11, it can levy no further or additional tax, except that in counties, cities, and school districts the rates may be increased with the prescribed vote for the purpose of erecting public buildings, as to which no maximum annual rate is fixed, by Section 11. * * * These exceptions as to annual rates do not apply to towns, unless we construe the words, 'for the purpose of erecting public buildings in counties, cities and school districts' as including towns; and if we do give them that construction, still the words 'public buildings' do not include waterworks."

In the second case which overrules the first, the same assumption is made that the term "public buildings" does not include general improvements. In pointing out what the court in the second case believes to be the impracticability of the application of its first opinion, it says, among other things:

(l. c. S. W. 758):

> "That construction of the organic law (the construction of the first case limiting indebtedness under Section 12 to such as could be retired within the tax levy limits of Section 11) would practically eliminate the grant of power to incur an indebtedness, except for public buildings, under the provisions of Section 12."

It does not seem to occur to the court to designate a water plant or light plant as covered by the term "public buildings." The Supreme Court of Missouri apparently holds that the descriptive terms of these constitutional provisions are to be strictly construed, according to *Brooks* v. *Schultz, Tax Collector,* 178 Mo. 222, 77 S. W. 861 (1903) which holds in the closing words of the opinion that although "a public library is an educational institution" it cannot be included under the constitutional term "school purposes."

But what of respondent's claim that petitioner errs in stating that this case of *Union Trust Co.* v. *Pagenstecher, Tax Collector, supra,* holds the statute in question, Section 7031, R. S. Mo., 1929, providing for a "special public sewer tax" to be unconstitutional? Petitioner maintains that *in so far as that statute*

undertakes to provide for a tax in excess of the constitutional levy of 50 cents on the $100 valuation, it is unconstitutional even as to structures that, unlike a sewer, may be included under the constitutional exceptional term "public buildings." The statutory authorization is this: "The *board of aldermen* may levy a tax * * * which tax shall be called 'special public sewer tax,' etc." The statute does not say that the board of aldermen may submit to the people a proposition for a certain tax, etc. That is taxation machinery unprovided.

Petitioner has qualified its statement that the statute is unconstitutional by the phrase "in so far as the statute undertakes to provide for a tax in excess of the constitutional levy of 50 cents on the $100 valuation." Indeed it would seem the better view that the statute contemplates no tax in excess of 50 cents on the $100 valuation and that such statutory purity of intention accounts for putting the tax levy authorization in the board of aldermen. Within the limitation of 50 cents on the $100 valuation they had constitutional power to make a levy without taking any vote of the people. The occasion for the statute was not the attempt to provide a tax in excess of 50 cents on the $100 valuation, but merely the undertaking within that amount to provide for a segregation of a certain part of the total tax levy to a specific improvement: "and the fund arising from said tax shall be appropriated solely to the constructing, reconstructing and repair of said sewer."

Clearly this Section 7031, R. S. Mo., 1929, with its "special public sewer tax" which it seems most probable herein is what the courts below both had in mind as the revenue source for constructing a secondary sewage disposal plant, provides no such possibility. This is true whether the tax provided for in the statute be regarded as a special tax or as a general tax.

(c) Special Assessments: Respondent proposes as this third method that the City create a district sewer system or possibly follow that up with a joint district sewer system, and then by an assessment method pay for the construction of the additional plant.

Respondent rides rough shod over the fact, first, that such action would be legislative, and second, that there may exist very substantial reasons why this town of two thousand should not create sewer districts. But the additional important observation is that such a tax imposed upon the entire City, even if done through the device of sewer districts for district sewers, is really and truly a general assessment or general tax and under the constitutional limitation of any general tax. Respondent would advise that where a city is cut off from constructing certain improvements on the deferred obligation basis by the constitutional limitations against indebtedness, and where it is cut off from building it out of its tax levies, either because the general limitation of tax levy provides insufficient funds, or (if a sewer system be included under "public buildings") because the voters refuse to give a two-thirds approval, then the City by simple vote of the

board of aldermen can turn to the plan of throwing the whole City into a sewer district and building the sewer upon a special assessment basis.

If the district sewer plan be followed then the method of payment found in Section 7032, R. S. Mo. 1929 (App. A), is provided by an assessment plan in which the total cost of the sewer is apportioned "against the lots, tracts, or parcels of ground, exclusive of improvements, in proportion to the area of the whole district, exclusive of public highways." If it be said that this method of taxation, even though the assessment be spread over the entire City, is not a general tax, then we are face to face with the fact that we propose to transfer from one group of taxpayers to another the burden of compliance imposed upon the first group. Moreover, such an assessment against land on an area basis could only be legally justified in the event the tax could be sustained as a financial benefit to the land.

The present system is already a public sewer built as required for a public sewer, "along the principal courses of drainage." Respondent does not disclose, and the statutes do not provide, authorization for changing a public sewer into a district sewer. Observe that to the contrary *Union Trust Co.* v. *Pagenstecher, Tax Collector, supra,* infers that the district sewer assessment plan has no application to the improvement of a public sewer, 119 S. W. l. c. 1104:

> "The statute under review divides sewers into three classes, *i. e.*, 'public, district and private

sewers.' The tax allowed is only for public sewers, and these are, by the act itself, defined to be such as 'shall be established along the principal courses of drainage,' showing that the purpose was to pay out of public funds only for such sewers as were of utility to the municipality as a municipality, and not such as were especially beneficial to a particular portion of the municipality. *For other than public sewers,* the succeeding sections provide the manner of payment. District sewers must be paid for by special assessments against the property within the district (citing district sewer statute, see App. A). Private sewers must be paid for by the individual (citing private sewer statute.)"

(d) GENERAL REVENUE: At this point we meet respondent's insinuation against our conclusion of law and fact that the City has a general revenue income of approximately $6,000.00 a year. The last official property valuation that had been completed at the time of the trial was that testified to by the witness, at the bottom of page 101 of the record, as the valuation made on June 1st, 1928, to-wit, $1,224,118.00. Fifty cents on the $100.00 valuation of this amount is $6,120.59. And the witness further testified that a substantial portion of these taxes was uncollectible (R. 102) and also that it required the entire City's income for the City's ordinary current expenses (R. 112).

But if we come now to Section 7276, R. S. Mo. 1929 (P. 13), invoked at this point by respondent, we find first that this section was not in existence at the time the sewer in question was built and its character as a permanent or temporary nuisance settled.

Even now, as pointed out in our original petition and brief herein (P. 8, 50), the requirement would be approximately $4,500.00 a year for an additional sewer plant. In addition to the witness' statement (R. 112), that the entire annual revenue of $6,000 is required for ordinary revenue purposes, there is the financial statement of the City's affairs (R. 102-107), in verification.

Balanced Equities.

Petitioner advances no further comment except to refer to the final citation, its quotation and voluminous citations terminating the discussion herein (pp. 50-51) of permanent and temporary nuisance.

Conclusion.

Petitioner respectfully submits that the nuisance in question is a permanent nuisance because of its physical character and because it may not be discontinued without serious impairment of the public welfare, and that the decree in effect undertakes to command the exercise of legislative power which it may not rightfully do, and that such decree makes financial requirements of the City beyond the latter's constitutional powers to comply; and that therefore said decree should be set aside and the plaintiff's petition filed in the trial court dismissed, and instructions issued accordingly to the United States Circuit Court of Appeals for the Eighth Circuit.

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APPENDIX.

Reference has been made in the course of these briefs to the city's building the disposal plant in question by a district sewer assessment, and for that purpose the full provision of the statute governing that matter is set out herewith.

Also, frequent references are made to Sections 11, 12 and 12-A of Article X of the Constitution of Missouri. An abridgment of these provisions of the Constitution, covering what petitioner thought were all possible points of consideration, was included in petitioner's original brief herein, pages 9-11. To make entirely certain that no matter included in those sections, that might be considered of any importance, is omitted from convenient access to the court, the same are set out here in full.

A.

Section 7032, R. S. Mo. 1929:

"DISTRICT SEWERS—HOW ESTABLISHED—CERTIFIED TAX BILLS SHALL BECOME DUE AND PAYABLE, WHEN—HOW PAID.—District sewers shall be established for the districts created to be prescribed by ordinance, and shall connect with the public sewers or other district sewers or with the natural course of drainage as each case may be, and may be constructed with the main branch or discharge pipe wholly within or beyond the boundary of the district, as the board of aldermen shall determine. Such district may be subdivided, enlarged or changed by ordinance at any time previous to the

construction of the sewers therein; and more than one district sewer may be laid in a sewer district if deemed necessary by the board of aldermen for sanitary or other purposes. The board of aldermen shall cause sewers to be constructed in each district whenever a majority of the resident property holders therein shall petition therefor or whenever the board of aldermen shall deem such sewers necessary for sanitary or other purposes, and said sewers shall be of such dimensions and materials as may be prescribed by ordinance, and may be changed, enlarged or extended, and shall have all necessary laterals, inlets, catch basins, manholes and other appurtenances. As soon as any district sewer shall have been completed the city engineer or other officer having charge of the work shall compute the whole cost thereof and shall apportion the same against the lots, tracts or parcels of ground, exclusive of the improvements, in proportion to the area of the whole district exclusive of public highways, and such officer shall report the same to the board of aldermen by bill or otherwise and the board of aldermen shall thereupon levy and assess a special tax by ordinance against each lot, tract or parcel of ground within the district in the name of the owner or owners thereof. Whereupon the city clerk shall make out a certified tax bill under the seal of the city of such assessment against each lot, tract or parcel of ground within the district in the name of the owner or the owners thereof. Said certified special tax-bill shall be signed by the mayor and attested and recorded by the city clerk and shall be delivered to the contractor for the work, who shall proceed to collect the same by the ordinary process of the law in the name of the city to his own use and in case of absent owners he may sue by attachment or by any other process known to the law. Such certified tax-bills shall become due and payable thirty (30) days after the date of

issue thereof, unless the owner of the property described therein shall have filed a written request with the city clerk, prior to the acceptance of the work by the city, that his tax-bill or bills shall be made payable in installments, in which event such special tax-bill shall be payable in annual installments as follows: One-fifth in one year, one-fifth in two years, one-fifth in three years, one-fifth in four years and one-fifth in five years after the date of their issue. The whole of any such special tax-bill made payable in installments may be paid at the date of any installment payment: *Provided, however,* that if any installment is not paid when the same becomes due the remaining unpaid installments shall, at the option of the holder of the tax-bill, become immediately due and payable. Every such certified tax-bill whether the same be made payable in installments or not, shall bear interest at the rate of eight per centum per annum from thirty days after the date of issue until paid, and shall be a special lien against the property described therein for a period of five years from its date, except when made payable in installments, when the special lien shall for a period of one year after the date of the last installment payment shall become due. Every such certified tax-bill shall on action brought to recover the amount thereof be *prima facie* evidence of the validity of the charges against the property therein described and of the liability of the person or persons therein named as the owner or owners of such property. (R. S. 1919, Section 8483. Amended Laws 1921, p. 503.)"

B.

Constitution of Missouri, Article X, Section 11:

"RATES FOR LOCAL PURPOSES—LIMITS—HOW INCREASED FOR SCHOOL AND ERECTING PUBLIC BUILD-

INGS—ST. LOUIS MAY LEVY AS IF PART OF A COUNTY.—Taxes for county, city, town and school purposes may be levied on all subjects and objects of taxation; but the valuation of property therefor shall not exceed the valuation of the same property in such town, city or school district for state and county purposes. For county purposes the annual rate on property, in counties having six million dollars or less, shall not, in the aggregate, exceed fifty cents on the hundred dollars valuation; in counties having six million dollars and under ten million dollars, said rate shall not exceed forty cents on the hundred dollars valuation; in counties having ten million dollars and under thirty million dollars, said rate shall not exceed fifty cents on the hundred dollars valuation; and in counties having thirty million dollars or more, said rate shall not exceed thirty-five cents on the hundred dollars valuation. For city and town purposes the annual rate on property in cities and towns having thirty thousand inhabitants or more shall not, in the aggregate, exceed one hundred cents on the one hundred dollars valuation; in cities and towns having less than thirty thousand and over ten thousand inhabitants, said rate shall not exceed sixty cents on the hundred dollars valuation; in cities and towns having less than ten thousand and more than one thousand inhabitants, said rate shall not exceed fifty cents on the hundred dollars valuation; and in towns having one thousand inhabitants, or less, said rate shall not exceed twenty-five cents on the hundred dollars valuation. For school purposes in districts composed of cities which have one hundred thousand inhabitants or more, the annual rate on property shall not exceed sixty cents on the hundred dollars valuation and in other districts forty cents on the hundred dollars valuation: Provided, the aforesaid annual rates for school purposes may be increased, in districts formed of cities and towns, to an amount not to exceed one dollar on the hun-

dred dollars valuation, and in other districts to an amount not to exceed sixty-five cents on the hundred dollars valuation, on the condition that a majority of the voters who are taxpayers, voting at an election held to decide the question, vote for said increase. For the purpose of erecting public buildings in counties, cities or school districts, the rate of taxation herein limited may be increased when the rate of such increase and the purpose for which it is intended shall have been submitted to a vote of the people, and two-thirds of the qualified voters of such county, city or school district, voting at such election, shall vote therefor. The rate herein allowed to each county shall be ascertained by the amount of taxable property therein, according to the last assessment for state and county purposes, and the rate allowed to each city or town by the number of inhabitants, according to the last census taken under the authority of the state, or of the United States; said restrictions as to rates shall apply to taxes of every kind and description, whether general or special, except taxes to pay valid indebtedness now existing, or bonds which may be issued in renewal of such indebtedness: Provided, That the City of St. Louis may levy for municipal purposes, in addition to the municipal rate of taxation above provided, a rate not exceeding the rate which would be allowed for county purposes if said city were part of a county."

C.

Constitution of Missouri, Article X, Section 12:

"Municipal Indebtedness, Limit of—How Increased—Exceptions as to Certain Cities.—No county, city, town, township, school district or other political corporation or subdivision of the State shall be allowed to become indebted in any manner or for any purpose to an amount exceeding in any year the income and revenue provided for such

year, without the consent of two-thirds of the voters thereof voting on such proposition, at an election to be held for that purpose; nor in cases requiring such assent shall any indebtedness be allowed to be incurred to an amount including existing indebtedness, in the aggregate exceeding five per centum on the value of the taxable property therein, to be ascertained by the assessment next before the last assessment for state and county purposes, previous to the incurring of such indebtedness, except that cities having a population of seventy-five thousand inhabitants or more may, with the assent of two-thirds of the voters thereof voting on such proposition at an election to be held for that purpose, incur an indebtedness not exceeding ten per centum on the value of the taxable property therein, to be ascertained by the assessment next before the last assessment for state and county purposes previous to the incurring of such indebtedness; such proposition may be submitted at any election, general or special: Provided, That with such assent any county may be allowed to become indebted to a larger amount for the erection of courthouse or jail, or for the grading, construction, paving, or maintaining of paved, graveled, macadamized or rock roads and necessary bridges and culverts therein; And Provided Further, That any county, city, town, township, school district or other political corporation or subdivision of the State, incurring any indebtedness requiring the assent of the voters as aforesaid, shall before or at the time of doing so, provide for the collection of an annual tax sufficient to pay the interest on such indebtedness as it falls due, and also to constitute a sinking fund for the payment of the principal thereof, within twenty years from the time of contracting the same: And Provided Further, That the corporate authorities of the City of St. Louis are hereby authorized to issue interest-bearing bonds

of said city in the amount of five million dollars, at a rate of interest not to exceed four per cent per annum, the principal payable within thirty years from the date of their issue, and the proceeds thereof shall be paid to the corporation organized for the celebration of the Louisiana purchase centennial in said city, to be used by said corporation for said celebration, holding a world's fair or exposition in said city. And said corporate authorities of St. Louis shall be repaid as large a proportionate amount of the aid given by them as shall be repaid to the stockholders of said corporation on the sum subscribed and paid by them, and any surplus remaining from the assets of said corporation after said stockholders and said city shall have been paid in full, shall be divided between said stockholders and said city in proportion to the aggregate amount of said stock so paid in and the amount so loaned by said city; and any amount so received by said city from said corporation shall be paid into the sinking fund of said city for the redemption of its outstanding bonds: Provided, That if, at the election for the adoption of this amendment to the Constitution, a majority of the votes cast within the limits of said City of St. Louis voting for and against this amendment shall be against its adoption, then no bonds shall be issued under this amendment; And Provided Further, That no such indebtedness so created shall be in any part thereof paid by the state or from any state revenue, tax or fund, but the same shall be paid by the City of St. Louis alone. Provided, That in the City of St. Louis the amount of bonds now aggregating $6,111,000, that being the amount assumed by said city in the scheme of separation from the County of St. Louis, and the sum of $5,808,000 heretofore prior to January 1, 1901, expended in the construction of waterworks for the City of St. Louis and any bonds which may be hereafter issued by said city in the construction

and improvement of waterworks, the payment of the interest whereon and the principal whereof shall be provided from the revenues of said waterworks; that is to say, the amount of said bonds which shall be outstanding at the time shall not be included in the computation of the existing bonded indebtedness in determining the amount of bonds authorized to be issued by said city with the assent of two-thirds of the voters under the provisions of this article, but said city shall be authorized at any time to issue bonds, with the assent aforesaid, to an amount, including outstanding indebtedness, other than that above named, to the amount of ten per cent of the value of the taxable property in said city, to be ascertained as above provided, and said city shall have power, with such assent of the voters, to issue bonds for the construction and improvement of waterworks, the interest whereon and the principal whereof shall be provided for from the income of said waterworks. Said city shall establish a sinking fund for the payment of the bonds so authorized according to the times fixed for the maturity of the same. Provided, Further, That any city which now has or may hereafter attain a population of seventy-five thousand or more inhabitants may acquire, by purchase, condemnation or construction, waterworks, gas works, electric light works, street railways, telegraph and telephone systems, heating plants, ice or refrigeration plants, or any other plant, system or public service institution, within or outside of the limits of such city, for the use of the city or its citizens, and for the purpose of paying therefor, in whole or in part, may issue public utilities bonds, which public utilities bonds shall not be included in the liabilities or indebtedness of the city limited by the prior provisions of this section; but the total amount of such public utilities bonds to be issued by such city shall not exceed twenty per centum of the

value of the taxable property in said city, to be ascertained as above specified. The principal of said public utilities bonds shall not constitute an obligation of the city enforceable out of the funds raised by taxation. Such city may also issue its bonds, other than public utilities bonds, for the payment, in whole or in part, for such public utilities, and such bonds, other than public utilities bonds, shall constitute a direct obligation of the city, but the total amount of such bonds, other than public utilities bonds, shall not exceed in the aggregate ten per centum of the taxable property therein, as hereinbefore provided, but such bonds, other than public utilities bonds, shall require the assent of two-thirds of all the legal votes cast on that proposition. The ordinance authorizing the purchase, condemnation or construction of such public service plant or system shall provide what portion, if any, of the cost thereof shall be paid by issue of public utilities bonds, and what portion, if any, shall be paid by issue of general bonds of the city, other than public utilities bonds. The principal and the interest of such public utilities bonds shall be paid out of the earnings or sale of the utilities plant or system for the acquisition of which said issue was made, but the city may thereafter provide, by ordinance, for the payment in any year of any part of the interest or principal of said bonds due in that year, out of the general revenue of that year raised by general taxation. Such city shall have power to execute its mortgage or mortgages on any such utility, or any addition thereto, or extension thereof, to secure the payment of such public utilities bonds, and in case of default in the payment of such public utilities bonds, and the interest thereon or interest thereon, said bondholders, or their representatives, may appeal to any court of competent jurisdiction, sitting in the county or city in which such city is located, and said court may, in its

discretion, if said default continue, appoint a receiver to take charge of such property, and such receiver shall operate said property pending such proceeding in such court, and until a final decree of foreclosure in such proceeding, and for a period of one year thereafter, during which period the city may, upon payment to the bondholders of all indebtedness past due, and court costs, and receiver's obligations, retake said property, subject to its unmatured obligations. If said property is not thus retaken by the city in said period of redemption, said receiver shall deliver said property to such party, as the court in such action may order, and thereupon all liability of the city on said bonds shall cease and determine and its rights as owner of said utility or plant shall cease, and determine, and thereafter said utility or plant shall be operated by the party named in said order of courts, or his successors or assigns, in conformity with and subject to the provisions of the ordinance authorizing the acquisition or purchase or construction of said public utility or plant, and the issuance of bonds therefor; but such city shall not issue any such public utilities bonds without the assent of four-sevenths of the voters thereof, voting on that proposition, at an election to be held for that purpose, and such proposition may be submitted at a special election or at a general election, in either of which events if four-sevenths of all of the legal votes cast on such propositions are in favor of the issue of said bonds, the city shall have authority to issue the same. Such utility may be acquired by condemnation proceedings in the same manner that such city may acquire real estate for public purposes, or in such other manner as may be provided by law. Such city may, by a vote of the people in the manner herein provided, take up any public utilities bonds and issue its general bonds in lieu thereof, and may take up any general bonds issued on account

of any public utility and issue public utilities bonds in lieu thereof, whenever there exists such debt-making power of the city as will authorize the issue of such new bonds, but no substitution shall be made without the consent of the holders of such bonds."

D.

Constitution of Missouri, Article X, Section 12a:

"Certain Cities Allowed to Incur Additional Indebtedness for Waterworks, Ice Plants and Light Plants. Any city in this state, containing not more than thirty thousand (30,000) inhabitants, may, with the assent of two-thirds (2/3) of the voters thereof voting at an election held for that purpose, be allowed to become indebted in a larger amount than specified in Section 12 of Article 10 of the Constitution of this state, not exceeding an additional ten (10) per centum on the value of the taxable property therein, for the purpose of purchasing or constructing waterworks, ice plants, electric or other light plants, to be owned exclusively by the city so purchasing or constructing the same: Provided, That any such city incurring any such indebtedness requiring the assent of the voters, as aforesaid, shall have power to provide for, and before or at the time of incurring such indebtedness shall provide for the collection of an annual tax, in addition to the other taxes provided for by this Constitution, sufficient to pay the interest on such indebtedness as it falls due, and also to constitute a sinking fund for the payment of the principal thereof within twenty (20) years from the time of contracting the same, any provisions in this Constitution to the contrary notwithstanding."

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No. 559.

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In the Supreme Court of the United States

October Term, 1932.

CITY OF HARRISONVILLE, MISSOURI, *Petitioner,*

vs.

W. S. DICKEY CLAY MANUFACTURING COMPANY, *Respondent.*

RESPONDENT'S BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI.

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W. S. DICKEY CLAY MANUFACTURING COMPANY, *Respondent.*

RESPONDENT'S BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI.

No. 559.

RESPONDENT'S ADDITIONAL STATEMENT OF THE CASE.

The decree of which petitioner complains is based upon a finding by the trial court, affirmed by the Eighth Circuit Court of Appeals, that the sewage disposal facilities now operated by the City of Harrisonville create an *unnecessary* nuisance in Town Creek, a small watercourse running through about one hundred acres of respondent's wooded blue grass pasture land (R. 177).

The evidence of witnesses on both sides of the case shows that the City of Harrisonville (population 2,073) collects its sewage through collecting mains, and deposits it in an Imhoff tank (Exhibit 1, point "A," R. 142); that from this Imhoff tank the sewage is piped under the right-of-way of the defendant, Missouri Pacific Railroad, and flows therefrom into a watercourse upon the land of the respondent (Exhibit 1, point "B," R. 142; R. 36).

The evidence on both sides is undisputed that an Imhoff tank is merely a primary method for the reduction of sewage matter, and at best will not remove more than 55% to 60% of the putrescible matter from sewage (R. 50, 51, 83, 87; Chief Public Health Engineer for the Missouri State Board of Health, R. 63, 64).

Likewise testimony on both sides is undisputed that it was possible at the time the City of Harrisonville built its Imhoff tank (1923), and is still possible, to treat sewage in such a way that the effluent will not create a nuisance in a small watercourse, such as the stream upon the respondent's land (R. 51, 52, 84; Chief Public Health Engineer for the Missouri State Board of Health, R. 63, 66). The health engineer testified that he had officially recommended such treatment by the City of Harrisonville in a report to the City of Harrisonville in the year 1925 (R. 64). He gave the names of ten other towns in the State of Missouri of approximately the size of Harrisonville, some slightly smaller and some slightly larger, in which adequate sewage treatment has been provided (R. 52, 64). The health engineer testified that by the treatment used at these places the effluent from the disposal plant could be discharged into a watercourse no larger than the stream in question without creating a nuisance (R. 66); that in such a watercourse "the same

size or a little smaller than Town Creek, the stream below the point of discharge was clear, the bottom of the stream clear, and the water in good condition with no such deposits," as contained in Town Creek below the sewage outlet (R. 64).

The health engineer testified that the treatment given in the sewage disposal plant at the City of Harrisonville was "insufficient" (R. 66).

Testimony of the engineer for the respondent tended to prove that even the existing Imhoff tank as a primary disposal plant was inadequate in size; that its sludge digestion chambers were probably capable of taking care of a population of 1,000 (R. 51), whereas the population of Harrisonville is 2,073, and 1,200 to 1,500 persons were probably using the Harrisonville sewers in the fall of 1928 (R. 51); that raw sewage was passed directly from the main line of the sewer to the stream by a by-pass without being treated at all in the Imhoff tank (R. 51); that either due to a defect in design or operation, excessive odors of hydrogen sulphite were noticeable (R. 51); that there was septic action in the settling compartments (R. 51); grass, weeds and tomato plants were growing in the sludge bed and in the sludge and gas vent compartment of the tank (R. 51); some improvement had been made in this last respect, but without effect upon the maximum reduction of putrescible matter passing through the tank (R. 51).

Respondent's land through which the contaminated creek meanders is "bottom blue grass wooded pasture" suitable for pasturage, except for the contaminated water, and not used or suitable for other purposes (R. 36).

Town Creek, prior to the discharge therein from the city's sewage plant, was comparatively clear; one could see the bottom; the banks were free of discoloration (R.

37); the water in the creek was "good water to supply cattle"; the cattle drank it; there was no odor; the water was clear, except after a rain (R. 55); before the sewer plant was built "this creek (Town Creek) used to be as nice a little creek as you would want"; the water was fine; there were "lots of fish there" (R. 56-60). The Missouri State Health Engineer testified that above the sewer outlet the creek is "in about the condition you would expect a creek of that sort, apparently clear," and even in a dry period "when the flow is very moderate, the water is fairly clear" (R. 62, 63).

Experts applying various tests, including the dissolved oxygen test, the bio-chemical oxygen demand test, and bacteria counts, found gross pollution in the creek below the sewage outlet (R. 48, 49, 85, 136, 137).

The respondent in the trial below introduced no evidence as to damage to the value of the land, since the purpose of the suit is to enjoin an *unnecessary* nuisance. The respondent did introduce at the trial evidence of loss of rents during the period the nuisance has continued (R. 42, 44, 45, 55, 61).

THE PETITION AND BRIEF DO NOT COMPLY WITH THE RULES.

Petitioner's brief contains no statement of the grounds on which the jurisdiction of this court is invoked as required by 1 (c), Rule 27.

Petitioner's brief contains no specification of such of the assigned errors as are intended to be urged as required by 1 (e), Rule 27.

PETITIONER HAS STATED NO REASON JUSTIFYING A WRIT OF CERTIORARI.

(A) No Federal question is involved.

It is obvious from a reading of the petition and brief that the case does not involve the validity of any statute of the State of Missouri under the Constitution, treaties or laws of the United States; nor any federal question arising under the laws or Constitution of the United States.

(B) The question of what constitutes a temporary as distinguished from a permanent nuisance does not call for the exercise of the jurisdiction of the Supreme Court of the United States.

The petitioner's petition is that the sewage disposal plant in question constitutes a permanent nuisance, and that therefore the respondent was not entitled to an injunction against this nuisance. The petitioner's view is that respondent should have sued for damages to the

value of respondent's property, caused by the permanent nuisance, and that the awarding of such damages would confirm the right of the city to continue the maintenance of the nuisance.

It is to be borne in mind that petitioner, the City of Harrisonville, did not condemn a right to project the sewage of the city into the watercourse on plaintiff's land (R., p. 7). However, even if the city had secured such a right by condemnation, the respondent's position would have been the same. That position is that no municipality has a right to so dispose of its sewage as to create an *unnecessary* nuisance. The record demonstrates, and petitioner admits, that adequate treatment of sewage, such as is commonly in use in many towns of similar size, would relieve the nuisance (R., pp. 63, 50). Petitioner says, however, that it has a right to construct any type of sewage disposal plant it may see fit, however inadequate, and project the effluent therefrom onto respondent's land, and then say to respondent that there is no relief except damages. If this position were sound, then the city need not have gone to the trouble of erecting any disposal plant whatever; it might just as well have collected its sewage into one main line and let the outfall from that line into the watercourse on respondent's land. The city could then have said, with as much force as it says now, that the damage from a sewage system of that kind would be permanent rather than temporary, and the respondent would have no right except damages.

It is true that a municipality has a right by condemnation to acquire the use of natural watercourses for the disposal of sewage, but it is equally true that this power of condemnation, whether exercised by a municipality or

by private corporations vested with power of eminent domain, does not include the right to so use the facilities involved as to create a nuisance where methods are available to avoid the nuisance. This is the applicable local law in Missouri, firmly established by Missouri cases.

Mining Co. v. *City of Joplin*, 124 Mo. 129, 27 S. W. 406 (1894):

This is a leading case holding that, under the Missouri statutes, a stream may be used by a city for sewage disposal. The court found that the sewer in question did *not* create a nuisance and that it was, therefore, unnecessary to decide the question of the right of the city to maintain a nuisance (l. c. 136):

> "Whether the city can do this so as to create a public nuisance we need not inquire, for in our opinion the evidence makes out no such a case."

The court defines the limitations upon the power of the city as follows:

> "The proprietor of land through which a stream flows cannot insist that the water shall come to him in the natural pure state. He must submit, and that, too, without compensation, to the reasonable use of it by the upper proprietors; and he must submit to the natural wash and drainage coming from towns and cities. *But a city has no right to gather its sewage together and cast it into a stream so as to injure the lower proprietor. For damages thus sustained, the lower proprietor will have an action, and in many instances injunctive relief.*" (Citing cases.) (Italics ours.)

Swanson et al. v. *Bradshaw,* (Mo. App.) 187 S. W. 268 (1916) (not officially reported):

This was a suit in equity to enjoin the further maintenance of a nuisance consisting in the use of defendant's land outside the City of Springfield for disposing of the garbage and dead animals collected from the city. The defendant was operating under a contract with the city. The evidence of nuisance was held sufficient to sustain plaintiff's right to a perpetual injunction.

The court said (l. c. 269):

> "It is true that the garbage of the city must be taken care of and that defendant is engaged in a lawful and useful business. The evidence shows, however, that by some increased expense this garbage can be disposed of in a far more safe and sanitary way. The health officers of the city, both by report to the city and by oral evidence, pronounce the present method as improper and unsanitary. Even if defendant was using an approved method and was disposing of the garbage in a careful manner, this fact would not justify his interference with the reasonable and comfortable enjoyment by another of his property or his causing material injury thereto. Joyce on Nuisances, Sec. 167."

Scott v. *City of Marshall,* 223 Mo. App. 596, 14 S. W. (2d) 694 (1929):

This case was an action in two counts; first at law for damages, and second in equity for a mandatory injunction. Plaintiffs were the owners of property in Marshall, Missouri. The petition alleged that the city in constructing a sewer drain destroyed a natural watercourse so as to throw flood waters upon the premises of plaintiffs, depositing silt, manure and other filth and debris on

plaintiffs' premises. Upon the second count, the court rendered a mandatory injunction enjoining the city from maintaining and continuing the nuisance and ordering the city to abate said nuisance and to return and restore the watercourse to its natural condition as it was before the construction and erection of the sewer. On appeal the court said:

> "Finally, it is urged the court erred in finding for plaintiffs and granting them an injunction under the second count of the petition. Under the evidence adduced at the trial on the first count, the court reasonably could find that the floods deposited silt, manure and other filth and debris on plaintiffs' premises, that the situation created a nuisance which the trial court had jurisdiction to abate."

The same principle has been announced by the Supreme Court of the United States.

Baltimore, Etc., R. R. Co. v. *Fifth Baptist Church,* 108 U. S. 317, 2 S. Ct. 719, 27 L. ed. 739 (1883):

In this case, which is cited in *Edmondson* v. *City of Moberly,* 98 Mo. 523, 11 S. W. 990 (1889), a railroad under statutory authority built its shops and roundhouse next to a church. The case is frequently cited as showing the limitations upon the exercise of powers conferred by legislative authority. This language is to be noted, l. c. 331:

> "In the first place, the authority of the company to construct such works as it might deem necessary and expedient for the completion and maintenance of its road did not authorize it to place them wherever it might think proper in the city, without reference to the property and rights of others. * * *
>
> Whatever the extent of the authority conferred, it was accompanied with this implied qualification, that

> the works should not be so placed as by their use to unreasonably interfere with and disturb the peaceful and comfortable enjoyment of others in their property. Grants of privileges or powers to corporate bodies, like those in question, confer no license to use them in disregard of the private rights of others, and with immunity for their invasion."

The rule is well stated by the Supreme Court of Oklahoma.

The City of Oklahoma City, Oklahoma, v. *W. C. West,* 155 Okla. 63, 7 Pac. (2) 888 (1931):

In this case suit was brought to recover damages caused by discharge of unpurified sewage into a watercourse with resultant injury to the riparian owner. The right of the riparian owner to damage was sustained. The court held that the damages were caused not by a permanent structure, but rather by the manner of sewage disposal which the city had adopted. The court took judicial notice of the fact that sewage can be easily and successfully purified, so that a nuisance caused by discharge of unpurified sewage into a watercourse is merely a temporary nuisance which can be abated by the expenditure of money or labor. The court further held that it is not within the power of a municipality which is discharging unpurified sewage into a watercourse to the damage of a riparian owner to leave a riparian owner merely to his damages as for a permanent nuisance.

The court said:

> "A nuisance of this character, by discharging pollution into a stream, is not caused by a so-called per-

manent structure, but is caused by the manner in which the structure is used. We have repeatedly held such a nuisance to be temporary under the rule that where a nuisance can be abated by the expenditure of money or labor, it shall be considered temporary. These decisions, so far as pollution is concerned, may be based upon a hitherto unannounced application of the doctrine of judicial notice, and that the real rationale of the decisions may in the future be fully apparent, we announce that this court takes judicial notice of the fact that modern science has advanced to the point where sewage is capable of purification, and that it is not only capable of purification, but can be easily and successfully purified by the use of modern appliances. *Bennett* v. *City of Marion*, (Iowa) 93 N. W. 558 (1903). 'Indeed the purification is coming to be regarded as a necessity.' *Platt Bros. & Co.* v. *City of Waterbury*, 72 Conn. 531, 67 Atl. 508 (1900). We hold it to be necessary."

Other general law to exactly the same effect will be found in the following cases:

Jones v. *Sewer Improvement Dist. No. 3*, 119 Ark. 166, 177 S. W. 888 (1915).
Morse v. *City of Worcester*, 139 Mass. 389, 2 N. E. 694 (1885).
Chapman v. *City of Rochester*, 110 N. Y. 273, 18 N. E. 88 (1888).
Carmichael v. *City of Texarkana*, (C. C. W. Dist. Ark.) 94 Fed. 561 (1899).
City of Tecumseh v. *Deister*, 112 Okla. 3, 239 Pac. 582 (1925).
Harbison v. *City of Hillsboro*, 103 Ore. 257, 204 Pac. 613 (1922).
Sewage District No. 1 v. *Black*, 141 Ark. 550, 217 S. W. 813 (1920).

(C) The injunction in the case at bar does not command the legislative function of the municipality.

Petitioner argues that the injunction in the case at bar in effect requires the city to build an additional sewage disposal plant at a specified cost. This is not correct. The State Health Engineer testified that in 1925 he had recommended to the City of Harrisonville additional treatment of its sewage (R. 63, 64). The expert engineer testifying for plaintiff below named sand filters, trickling filters, or activated sludge as possible types of treatment which would eliminate the nuisance in question (R. 50, 51). He also pointed out inefficient and ineffective operation of the existing plant at Harrisonville (R. 51). None of the witnesses stated that any one particular system was necessary. The injunction requiring the abatement of the nuisance specifies no particular action which the city must take (R., p. 15). Petitioner concedes that a court has the right to enjoin the nuisance (Petitioner's Brief, p. 22); but complains that the court does not have the power to compel the city to build a definite type of disposal plant. The short answer to this is that the court has not ordered the city to do any specific act. True, under the decree the city must cease the "discharge of putrescible sewage matter" into the watercourse in question. Any number of methods are available to the city to comply with that injunction; it may pipe its sewage elsewhere, or utilize any of the several successful methods in common use for so reducing the sewage that the outflow will be non-putrescent. It may even abandon the sewer system and return to the method of private disposal by each householder if it feels that it must choose between that and maintaining *unnecessarily* a

system which dumps the entire sewage accumulation of the city upon the private property of the respondent.

(D) The financial powers of the city are not pertinent to determination of the petition for writ of certiorari.

The petitioner argues that the power of the city to raise funds by issue of bonds is limited to the sum of $12,583.00 (Petitioner's Brief, p. 51); also that although the city has statutory power to pay for sewage disposal plants by general revenue, yet such revenues are needed for other purposes; also that although there is statutory power to pay for sewage systems by special assessments, yet such a method would not be applicable to a disposal plant. These considerations are not applicable on a petition for writ of certiorari. They have been held inapplicable on the merits in a number of the cases cited above for the proposition that a city may not maintain an unnecessary nuisance. Furthermore, petitioner's argument under this head is based upon the false assumption that the decree below requires the city to spend a specified sum of money.

(E) A question of balanced equities is not pertinent to a petition for writ of certiorari.

Petitioner argues that the record in the case at bar shows a small amount of damage to respondent. It is to be borne in mind that respondent in the trial below introduced no evidence as to the value of the land in question. It did introduce evidence as to actual loss of rents (R. 42, 44, 45, 55, 61). Petitioner offers to compare this loss of rents over a period of a few years preceding the trial with what petitioner assumes will be the

cost of constructing a different disposal plant. This is an attempt to present in this court the question of whether the court below should have exercised a discretion based upon a comparison of plaintiff's damages with the inconvenience which an injunction would cause to the defendant. There is no showing in the petition whether the point was raised below. However that may be, such a consideration is not one affecting the discretion of the Supreme Court of the United States on a matter of certiorari. Furthermore, the petitioner again indulges in the false assumption that the decree requires the city to expend a specified sum of money to perform specific acts.

Respectfully submitted,

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Respondent.

CERTIORARI.

SUPPLEMENTAL AND REPLY BRIEF ON BEHALF OF RESPONDENT.

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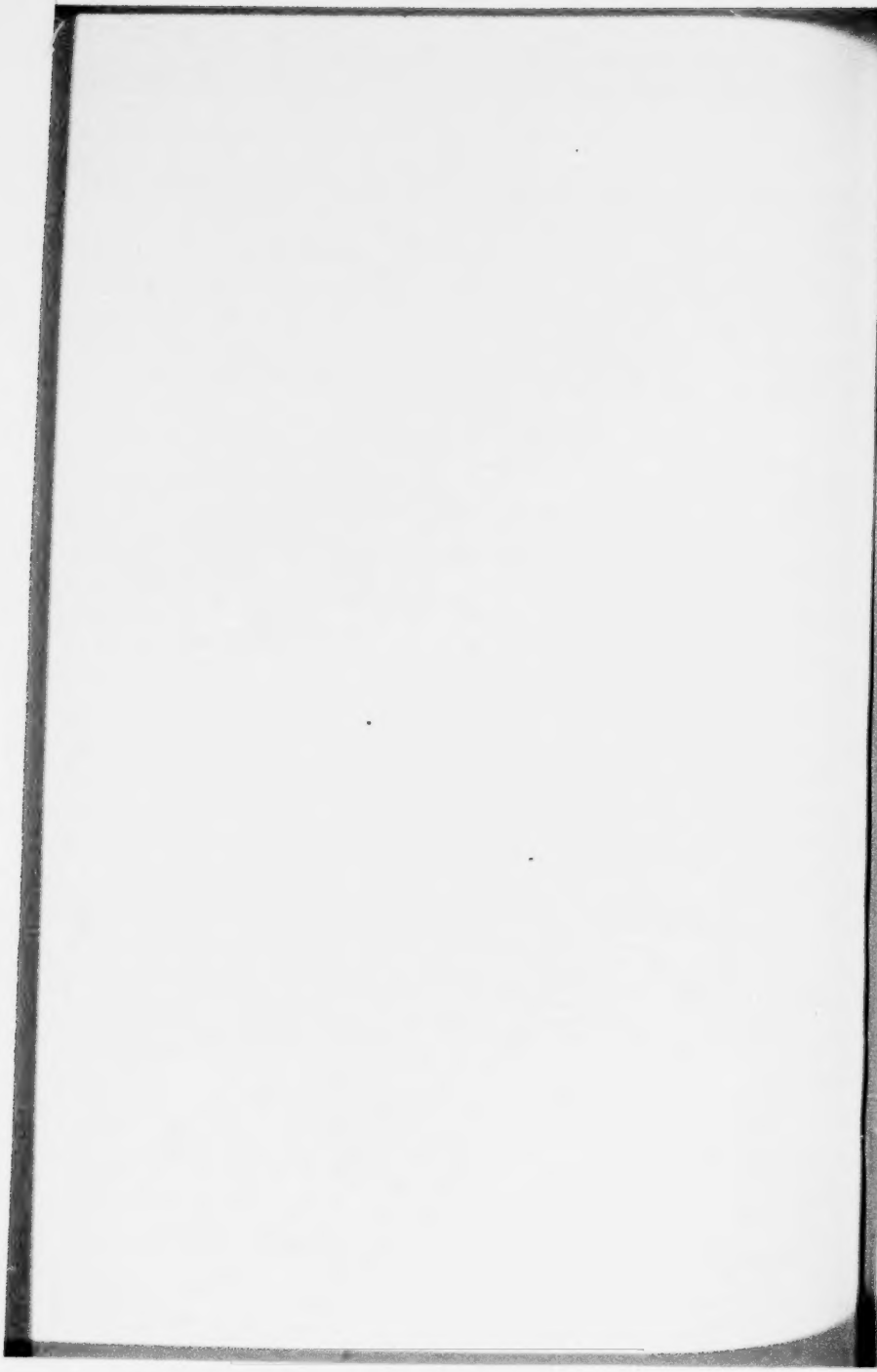

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In the

Supreme Court of the United States

October Term, 1932.

CITY OF HARRISONVILLE, MISSOURI, *Petitioner,*

vs.

W. S. DICKEY CLAY MANUFACTURING COMPANY, *Respondent.*

No. 559.

CERTIORARI.

SUPPLEMENTAL AND REPLY BRIEF ON BEHALF OF RESPONDENT.

Respondent's Additional Statement of the Case.

Respondent makes reference to the statement of the case contained in respondent's brief opposing petition for writ of certiorari, and does not here repeat the statement therein contained. It is admitted by petitioner that a nuisance exists in the watercourse on respondent's land. The record indicates the extent of this nuisance, and contains the admission of respondent's engineer that a possible 40,000 gallons per day of raw, putrescible

sewage matter may flow into Town Creek (R. 87). A finding as to the existence of the nuisance and its character is contained in the decree of the trial court; also that the nuisance is unnecessary and may be abated by reasonable means available to the city (R. 15).

It appears from the record that the nuisance may be due in part to defective operation of the existing sewage disposal plant, also to type of design which permits the entire sewage of the City to be passed around the existing disposal plant and discharged into the watercourse (R. 51). Petitioner admits that as to defective operation of the existing plant petitioner should not be heard to complain of the decree.

Petitioner's statement of the normal operation of an Imhoff tank should be supplemented by a statement concerning complete sewage reduction. The following is a paraphrase of the expert testimony on the point (R. 49-52).

The purification of sewage is simply a process of oxidation. The organic matter in sewage consumes oxygen. When the demand for oxygen existing in such organic matter has been satisfied, the sewage is purified, i. e., it is no longer putrescent. The Imhoff tank settles out solids, leaving suspended in the liquid which flows out of the tank forty to forty-five per cent of the organic matter—more if the Imhoff tank is inefficiently built or operated. Petitioner makes the statement in its supplemental and reply brief that the contents of the digestion chamber of the Imhoff tank constitute the most noxious part of the sewage. This is not the case. The organic matter in suspension in the liquid part of the sewage which passes directly through the Imhoff tank is just as putrescent, odorous and noxious as the solid matter

which settles in the tank. The organic matter which passes through the Imhoff tank must be further exposed to oxidation by some process. It may be confined in sand filters or confined in beds in which, by mechanical agitation, the process of oxidation will be accelerated or, if a body of running water is large enough, the oxidation will occur there by the reason of the presence of dissolved oxygen in water. In the case at bar the stream would have to be forty to fifty times larger than it is to supply the oxygen necessary to purify the quantity of sewage in question. Effective sewage disposal simply means complete oxidation. When that has been accomplished by any of the several available processes, then the liquid residue is harmless and inoffensive.

We proceed to a discussion of the issues which petitioner says are of sufficient importance to warrant the attention of this court. We discuss those issues in the order contained in petitioner's supplemental and reply brief.

Summary of the Argument.

I.

The sewage plant in question discharges raw, untreated sewage into the watercourse on respondent's land, and creates a condition of gross pollution, also contaminates with foul odors and noxious gases the air on respondent's premises and about the dwelling house thereon. Respondent's land is improved with barns, silos and other structures costing twenty-five or thirty thousand dollars, and is maintained as a farm for registered Hereford cattle of the value of $20,000.00 or more. The watercourse and one hundred acres or more of pasture land through which it runs is the heart of this farm,

which consists, however, of a considerably larger tract of land than the one hundred acres affected by the contaminated water supply. Petitioner admits the existence of the nuisance, and admits that the sewage disposal plant maintained by petitioner is incapable of reducing the sewage sufficiently to eliminate the nuisance. Petitioner also admits that improvements and additions to the plant could be made which would eliminate the nuisance, but contends that since the nuisance is caused by a physical structure enduring in its nature, the respondent has no cause of action except for damages.

Respondent contends, and the courts below found, that the City is unreasonably maintaining an unnecessary nuisance; that the existing plant can be easily improved, and that the improvements required to eliminate the nuisance will be such as are in general use in other municipalities in the State of Missouri of about the same size as the petitioner—some smaller. Respondent contends that damages at law would not constitute an adequate remedy, and that the City has no right to persist in the maintenance of a sewage system which was negligently constructed in the first instance, and is being negligently maintained. The courts below enjoined the City from discharging putrescible sewage matter into the watercourse, and allowed a reasonable time—six months—in which to abate the nuisance.

II.

Petitioner contends that the injunction is improper because the City has no financial resources with which to improve its sewage disposal plant. Respondent contends that if this were true it would not constitute a defense. If the City cannot maintain an adequate dis-

posal plant, meeting reasonable standards in general use by other municipalities, then it has no right to gather its sewage in mains and project it into the watercourse, thus leaving the entire burden upon respondent. However, respondent does not accept petitioner's position that the City is without financial powers, and shows that City has the following powers:

1. To issue bonds for at least one-half the cost of one method of improving the existing plant.

2. To levy a special public sewer tax under Missouri statutes to pay for the cost of such an improvement.

3. To levy special benefit assessments upon the land in joint sewer districts to pay the cost of such an improvement.

4. To contract for the construction, lease or use of adequate sewage disposal facilities, and pay under such contract over a period of ten years; that the total contract price will not be an indebtedness within constitutional limitations, and that a general tax sufficient to meet such contract payments will not fall within constitutional limitations for general taxation purposes.

III.

Furthermore the respondent contends that limitations upon the financial powers of the City are not applicable to indebtedness or expenditures involved by reason of a judgment, judicial decree, or other compulsion. Such limitations are applicable only to the voluntary acts of the City.

IV.

Petitioner asks this court to reverse the decisions below upon the ground that the inconvenience to the City will be great as compared with the injury to the respond-

ent. The doctrine of balancing such considerations does not obtain in Missouri. Furthermore, the matter is one of judicial discretion which this court will not ordinarily review on certiorari.

V.

The petitioner contends that the injunction encroaches upon the legislative function. To make the point petitioner assumes that the decree orders the City to perform positive acts. The decree merely enjoins discharge of putrescible sewage matter upon respondent's land. Furthermore, construction and maintenance of sewers is a corporate and not a governmental function.

ARGUMENT.

I.

The Question of Permanent or Temporary Nuisance—The Real Question Concerns Injunction of a Nuisance Created by an Inadequate and Insufficient Municipal Sewage Disposal Plant.

Petitioner urges this court to pass upon the question of what constitutes a temporary as distinguished from a permanent nuisance, asserting that that is a question of sufficient importance to warrant the attention of the Supreme Court of the United States. Petitioner in the case at bar wishes to establish that the admitted nuisance is permanent, not because the legal conception involved in a permanent nuisance renders the nuisance any less obnoxious, but rather because, according to petitioner, a permanent nuisance cannot be abated by an injunction in equity. The effect of applying petitioner's position to the facts in the case at bar would be to sanction permanently the City's act in constructing an inadequate sew-

age system, and the consequent burden imposed thereby upon respondent's land.

Petitioner's statement that respondent has an adequate remedy at law for damages is insufficient. True, respondent might have originally brought an action for damages. The remedy, however, would not have been adequate. The law throws every possible protection around an owner of land. For example, a contract to buy real estate is specifically enforceable. The purchaser is not left to a remedy at law for damages. One reason, among others, is that no two pieces of land are alike. No landowner can be adequately compensated in money for the loss of a particular parcel of land. Pomeroy, Specific Enforcement of Contracts (3rd Ed.), Sec. 9.

The record in this case discloses, and the trial court found that the tract of land in question is part of a farm used for pasturage purposes; that the farm has been improved by the construction of barns, silos and other equipment at an expense of twenty-five to thirty thousand dollars; that the land is used for pasturage of a herd of Hereford cattle; that many of these cattle are registered, and that the herd has a value of approximately twenty thousand dollars; that the contaminated watercourse is the only effective water supply for the entire farm (R. 177). It is impossible to compensate an owner in money for the injury done to a stock farm of such a character developed over a period of many years.

Furthermore, the statute of limitations has probably run against a cause of action for damages. Actions for trespass upon real estate are barred in five years in Missouri. Revised Statutes of Missouri 1929, Sec. 862 (see Appendix A). This period applies to actions at law to recover for stream pollution. *Kent* v. *City of Trenton*, 48 S. W. (2d) 571 (Mo. App., 1931) (not

yet officially reported). Petitioner in its effort to defeat the existing action urges that respondent has an action at law for damages, but we are safe in saying that limitations will be pleaded if that action should ever arise. Respondent confidently brought this action in equity, relying upon its right to enjoin an unnecessary nuisance. If this action be now defeated, respondent probably will be left with no remedy at all.

We repeat that the first object involved in petitioner's effort to secure from this court a decision that the Harrisonville disposal plant constitutes a permanent nuisance is to compel the respondent land owners to submit permanently to the results of the nuisance and relieve the City of whatever may be involved in the way of work and labor, and the expenditure of money to abate the nuisance. That such abatement is possible is admitted.

The second result of petitioner's position would be far-reaching. If the method of sewage disposal in the case at bar constitutes a nuisance which the courts cannot enjoin, then any less adequate method of disposal would also be beyond the power of injunction. In other words, despite the fact that standard methods for sewage disposal are wholly effective, so that complete reduction of the sewage may be accomplished, yet any city could disregard such methods, and project its sewage wholly untreated into any watercourse, leaving the landowner to bear all of the consequences; that is the result that petitioner asks this court to create by holding that the nuisance which petitioner is now maintaining may not be enjoined in equity.

We believe that the controlling principles in this field are already established by this court. The important question is not as to what constitutes a permanent nuisance, and what constitutes a temporary nuisance. The im-

portant question is: may the City exercise its function of sewage disposal in such manner as to create an unnecessary nuisance.

Petitioner's argument seeks to make magic words out of the phrases: permanent nuisance and temporary nuisance. If the nuisance is permanent, says the petitioner, injunction will not lie; if temporary, injunction will lie. These words should not be the basis for the decision. The question is: May a municipality build any kind of sewage disposal device, however crude or inadequate, discharge the effluent into the watercourse of an adjoining land owner, pay him damages for the diminished value of the land caused by the pollution and odors, and then go its way in peace; or must a city in disposing of its sewage have regard for standard methods of sewage disposal in general use by other cities of like size —methods which eliminate any need for pollution in the adjoining landowner's water course? In other words, may the city be as negligent as it pleases in constructing its sewage disposal plant or must it use reasonable standards of care? Upon this question the controlling factor is not whether the nuisance be permanent. Let us illustrate with the facts in the case at bar. Suppose the respondent had brought a suit for damages against the city and had recovered for diminished value of the land and for the discomfort, inconvenience and other injuries caused by the pollution, noxious odors, fumes and gases. Then suppose respondent had brought a second action for damages. Now if the nuisance were permanent, i. e., if all the damage which could occur were inherent in the original situation then the first action would be a bar to the second action. If, however, the nuisance were temporary, i. e., if all possible damage were not inherent in the original situation, then the first action would not

be a bar to the second. In reaching the first result, the courts speak of the nuisance as permanent, in reaching the second result they speak of the nuisance as temporary. Furthermore, limitations are always involved. If all possible damage were inherent in the original situation, limitations run from the date the offending cause began to operate; if not, then limitations do not apply.

Therefore, the words permanent and temporary are words which describe a legal result. If a first action for damages operates as a bar to a second action for damages for the reason that a plaintiff has had a full and complete recovery in the first action, then the nuisance is called permanent. If the first action does not operate as a bar to a second action for damages for the reason that a plaintiff did not have a full and complete recovery in the first action, then the nuisance is called temporary. Again, if all possible damage were inherent at the moment the offending cause began to operate then a right to damages will be barred by limitations unless asserted within the statutory period; in such cases the nuisance is called permanent. If, on the other hand, all possible damages were not inherent at the moment the offending cause began to operate then a right to damages will not be barred by limitations; in other words, limitations will not run from that initial moment. In such cases the nuisance is called temporary.

The correctness of this analysis will be disclosed by a consideration of petitioner's cases in which it will appear that in no case has an injunction against the negligent maintenance of a cause of nuisance been denied for the reason that the nuisance was permanent rather than temporary.

It may be considered that if the respondent in this case had brought an action for damages and had recovered for

diminished value of the land and other injuries, then if all possible damage were inherent at the moment the City's sewage plant began to operate that action would have been a bar to a second action for damages, and possibly to a later action for injunction; but, because respondent *could* have brought such an action does not mean that respondent was confined to that action and no other. Respondent's position is that no action for damages or series of actions for damages provide an adequate remedy; that the City is negligently maintaining a nuisance which proceeds from unnecessary causes; that the City is not complying with standards of care, reasonable and usual in the matter of sewage disposal; that therefore injunction will lie against such conduct.

Now let us examine the four cases upon which petitioner relies.

In *Kent* v. *City of Trenton*, 48 S. W. (2d) 571 (Mo. App. 1931; not yet officially reported—petition herein, page 25), no question was raised as to negligent construction or maintenance of the sewage structure. The action was for damages; the structure was completed and in operation in 1914; the action was brought in 1926. It was held that the action was barred by the five-year statute of limitations. It appeared also that the City had acquired from a prior owner an easement for the sewage outfall in consideration of the agreement of the City to waive taxes upon the property in question. It appeared also that the cause of the injury was an increased flow of sewage caused by the construction of a new sewage district, but that plaintiff had failed to allege this cause of action in the petition, and had set it up in a reply, which, under the Missouri law, may contain rebuttal matter only and will not be taken to aid the petition in stating a cause of action.

The case does not deal in any respect with negligent maintenance of a sewage disposal plant and is disposed of upon grounds entirely unconnected with that question. The Eighth Circuit Court of Appeals considered the case, and noted the fact that the decision rests upon points not involved in the case at bar. That court said:

> "Upon any one of two or more grounds specified in the opinion that case was rightly decided." (R. 193.)

In *Hayes* v. *Railroad*, 177 Mo. App. 201, 162 S. W. 266 (1914) (petition herein, p. 26), petitioner overlooks the significance of the result. In that case a railroad embankment was constructed without sufficient openings to allow passage of water in times of high water. A Missouri statute required such openings in all such embankments. Suit was brought for damages from overflow which occurred more than five years after the embankment was built. The court held that the action was not barred by the five-year statute of limitations. The court held the nuisance temporary because the embankment without the openings, was not a legal structure.

The court said:

> "This Act is a legislative declaration that railroad embankments are not to be regarded as permanent structures or nuisances to the extent of not requiring adequate openings to be made to afford sufficient drainage. An embankment without such opening is, since said legislative enactment, however it may have been before, an abatable nuisance to the extent of remedying the defects, and the damages caused thereby are to be sued for and recovered by successive actions as and when they occur within the statutory period of limitation after the same actually accrues. * * * In the case of *Charles* v. *Railroad*, 124 Mo. App. 293, 301, 101 S. W. 680, the court held that

> because of a decree of court in a condemnation proceeding providing for an opening through a railroad embankment which the railroad had failed to make, the court would not regard the same as a permanent structure, all damages arising from which must be sued for in one action, as the railroad probably would, and if not, could be made to construct the opening. The decree in that case was not more effectual in that respect than is the statute in this case."

The case is contrary to petitioner's contention that the nuisance is permanent because the structure is enduring. In the case at bar the structure, though enduring, is inadequate—so inadequate as to make its maintenance negligent. That this inadequacy is established by court decree rather than by statute is immaterial, as the court pointed out in the passage just quoted. The court in the Hays case quoted with approval the following passage from *Pinney* v. *Berry*, 61 Mo. 359 (1875):

> "But it is obvious that this rule (recovering the whole damage in one action) has no application to such nuisances as may be removed the day after the verdict, or for the continuance of which a second or third may be maintained, or which may be abated at the instance of the injured party, by the order of a competent court."

The trial court in the case at bar found, as a fact, such inadequacy. The appellate court confirmed the finding. This court will not disturb that finding upon a review on certiorari. *United States* v. *Johnston*, 268 U. S. 220, 45 S. Ct. 496, 69 L. Ed. 925 (1925); *Page* v. *National Gas Corporation*, 286 U. S. 269, 52 S. Ct. 507, 76 L. Ed. 1096 (1932).

In *Smith* v. *Sedalia*, 244 Mo. 107, 149 S. W. 597 (1912) (petition herein, p. 27), a suit was brought for damages and injunction against the City of Sedalia for discharge of the effluent from its sewer plant onto plaintiff's land. A prior suit had been instituted for damages on account of the same facts (*Smith* v. *Sedalia*, 152 Mo. 283, 53 S. W. 907 (1899). This prior suit was still pending. The real holding of the case is that the prior suit constituted a bar to the second suit. No question was raised in either case as to the adequacy of the sewage disposal plant or as to the negligent manner of its construction or operation. The litigation occurred 20 years ago, at which time methods of effective sewage disposal were not in as general use as they are today.

The court in the second case held that the plaintiff had elected, in his first suit, to confirm the right of the city to the use of plaintiff's land by bringing an action broad enough to cover damages for the diminished value of the land. The court held that a recovery of damages for the appropriation of the stream had the effect of confirming the right of the city to sewer into the stream as effectively as if that right had been obtained through condemnation. The first suit was an election by the plaintiff to adopt that form of relief. The court said:

> "Both suits brought by plaintiff are, substantially, actions for damages for injury to his land resulting from a wrongful appropriation by the defendant city. He concedes the right of the city to condemn, and complains because it has not done so, insisting in effect that the city shall put him in the position to claim permanent damages; but by his 1895 suit he has put himself in position to claim the same measure of damage in full compensation for the injury.
>
> II. Holding as we do that the injury is permanent, and that damages in full compensation can be

> awarded in the suit pending in Johnson County, such damages to be measured by the decrease in market value of the land caused by the sewer, it is obvious that plaintiff cannot have such compensation and also maintain a suit for injunction. A recovery of damages as indicated would have the effect of confirming the right of the city to sewer into the stream as effectually as if the right had been obtained through condemnation (*Doyle* v. *Railroad,* 113 Mo. 280)."

The decision is correct. Obviously a property owner could not institute an action for the entire damage suffered, including diminished value of the land, and then afterwards seek an injunction. The case so holds; but it does not hold that a property owner who elects in the first instance to seek an injunction against a nuisance, can not have that remedy. Petitioner misconstrues the effect of the decisions allowing recovery in one action for all damages. Petitioner apparently believes that because such a recovery may be had at law, that is the only remedy available. None of the cases cited by petitioner establish such a principle.

Likewise in *Horine* v. *Peoples Sewer Company,* 200 Mo. App. 233, 204 S. W. 735 (1918) (petition herein, p. 29), no issue was raised as to the adequacy of the sewage disposal facilities or as to the management, construction or maintenance thereof. Plaintiff simply sued to enjoin the discharge of the sewage without any showing as to whether the plant maintained by the city was as effective as possible, and it does not appear whether the city had done all that could be done to minimize the nuisance. Furthermore, it appears in the case that the city had acquired a prescriptive right over a long period of years, and that as in the case of *Smith* v. *Sedalia, supra,* a prior

action at law for damages was pending. The court said that it would not enjoin the further operation of the sewage plant "when it clearly appears that any injury caused to plaintiff by the sewer can be fully compensated by a *pending* action at law." (Italics ours.)

Thus, upon examination, it appears that the four cases relied upon by petitioner to defeat respondent's action for injunction do not establish the proposition that under no circumstances will the Missouri courts enjoin the maintenance of a municipal sewage plant. In none of those cases was the question of negligent construction or negligent operation of a sewage plant involved. Those cases hold that a property owner may have one action for damages in which all damages past or future may be recovered at law, but they do not hold that upon a showing of insufficient or negligent construction or operation injunction will not lie. Upon that point the cases cited in respondent's brief opposing petition for writ of certiorari are clear (pp. 5-11). In addition to those authorities, respondent invites attention to the following cases:

In *Missouri* v. *Illinois and the Sanitary District of Chicago*, 180 U. S. 208, 21 S. Ct. 331, 45 L. Ed. 493 (1901), there was an original proceeding in this court to enjoin the discharge of the sewage from the city of Chicago through an artificial canal into the Mississippi River. The decision of this court was rendered upon a demurrer to plaintiff's petition. This court said of the petition:

> "The object of the bill is to subject this public work to judicial supervision, upon the allegation that the method of its construction and maintenance will create a continuing nuisance, dangerous to the health of a neighboring state and its inhabitants."

The demurrer to the bill was overruled, and the defendants given leave to file answers. Thus it is plain that this court held that there is an inherent jurisdiction in equity to pass upon the reasonableness of methods adopted by a municipality to dispose of its sewage. In the *Illinois* case, *supra,* this court cited with approval the decision in *Chapman* v. *City of Rochester,* 110 New York 273, 18 N. E. 88 (1888).

In the *Chapman* case plaintiff, living in the suburbs of defendant city, collected the waters of a stream which arose in the city and flowed across his property, in an artificial basin for domestic uses. The city constructed sewers, discharging surface water and sewage into the stream above plaintiff, rendering its water unfit for use, etc. In an action for damages and injunction against continuance of the nuisance, plaintiff recovered $1200.00 present damages and the injunction prayed, and judgment was affirmed, the court saying:

> "These and other facts well warranted the conclusion of the trial court that the act of the defendant, in thus emptying its sewers, constituted an offensive and dangerous nuisance. Moreover, the plaintiff is found to have sustained a special injury to his health and property from the same cause; and we find no reason to doubt that he is entitled, not only to compensation for damages thereby occasioned, but also to such a judgment as will prevent the further perpetration of the wrong complained of. *Goldsmid* v. *Commissioners,* L. R. 1 Eq. 161, L. R. 1 Ch. 349. In view of the principle upon which these and like decisions turn, the objections of the learned counsel for the defendant, against the judgment appealed from, are quite unimportant. The filth of the city does not flow naturally to the lands of the plaintiff, as surface water finds its level, but is carried thither by artificial arrangements prepared

> by the city, and for which it is responsible. * * * In fine, the case comes within the general rule which gives to a person injured by the pollution of air or water, to the use of which in its natural condition he is entitled, an action against the party, whether it be a natural person or a corporation who causes that pollution."

The above language is quoted in part with approval by the Supreme Court of the United States in *Missouri* v. *Illinois, supra.*

Missouri v. *Illinois* is cited by the Supreme Court of Michigan in *Attorney General ex rel.* v. *City of Grand Rapids,* 175 Michigan 503, 141 N. W. 890 (1913). In that case an injunction was sustained against the city to prevent the emptying of the city's sewage into a stream so as to constitute a nuisance to riparian owners lower down the stream. The court expressly repudiated the doctrine that the necessity of the city excused the nuisance, saying:

> "The doctrine that necessity is no defense to an unreasonable pollution of a watercourse is supported by the following cases: *Straight* v. *Hover,* 79 Ohio St. 263, 22 L. R. A. (N. S.) 276, 87 N. E. 174; *Hunter* v. *Taylor Coal Co.,* 16 Ky. L. Rep. 190; *Beach* v. *Sterling Iron & Zinc Co.,* 54 N. J. Eq. 65, 33 Atl. 286; *H. B. Bowling Coal Co.* v. *Ruffner,* 117 Tenn. 180, 9 L. R. A. (N. S.) 923, 100 S. W. 116, 10 Ann. Cas. 581; *Day* v. *Louisville Coal & Coke Co.,* 60 W. Va. 27, 10 L. R. A. (N. S.) 167, 53 S. E. 776."

In *Baltimore and Potomac R. R. Co.* v. *Fifth Baptist Church,* 137 U. S. 568, 11 S. Ct. 185, 34 L. Ed. 784 (1891), the case of a nuisance caused by the proximity of the railroad company's shops to the church property

came before this court for a second time. The first case under the same title is reported in 108 U. S. 317, 2 S. Ct. 719, 27 L. Ed. 739 (1883) (respondent's brief opposing petition for writ of certiorari, p. 9). The second case adds nothing to the principle outlined in the first case, viz., that the power of eminent domain may not be exercised unreasonably. The case is significant, however, in showing that although the offending structure in that case was enduring (an engine house and repair shop), yet this court did not treat the nuisance as permanent in the sense that the first recovery of damages was a final recovery. This court permitted recovery in two subsequent actions, both involved in the second case, and it expressly held that the damages awarded in the second case should not be minimized by the amount of the initial recovery. That this court regarded the engine house in that case as a continuing or temporary nuisance in the sense that repeated recoveries could be had is clear from the following quotation:

> "The cases at bar afford a good illustration of the rule of law, and of its application, as stated by Blackstone: 'Indeed every continuance of a nuisance is held to be a fresh one; and therefore a fresh action will lie, and very exemplary damages will probably be given, if, after one verdict against him, the defendant has the hardiness to continue it.' 3 Bl. Com. 220."

In *Bollinger et al. v. American Asphalt Roof Corporation*, 224 Mo. App. 98, 19 S. W. (2d) 544 (1929), plaintiffs maintained a home, and boating business, on the Blue River near Kansas City, Mo. Defendant operated a factory near by and discharged into the stream oil and noxious fluids and odorous compounds and caused soot, smoke, fumes and odors to be discharged into the

air, thus rendering the stream unfit for plaintiff's business and so contaminating the air as to render plaintiff's home and place of business untenable and useless. The factory had been built and put in operation by October 1, 1920. The suit was commenced September 30, 1926. Defendant contended that the injury was permanent and had continued for more than five years and hence that plaintiff's suit for damages was barred by limitations. The court held that the nuisance was not permanent because "abatable." The court said on this point:

> "By their very nature the things involved in the manner of use of the plant are abatable, and the evidence shows that some of them in this case were, in fact, abated in part, for example, by the erection of a 60-foot condenser stack in 1923, for the disposition of fumes and smoke * * *."

So in the case at bar all that is required is the addition of certain features to the existing sewage plant to abate the nuisance (R. 51).

A nuisance is not permanent because the source is a tangible structure rather than an intangible act, method or use. A nuisance is permanent only when the cause, whether a physical structure or not, is unchangeable or unabatable.

In *Blankenship* v. *Kansas Explorations*, 325 Mo. 998, 30 S. W. (2) 471 (1930), plaintiff brought action against defendant for the diminished value of plaintiff's mill caused by the dumping of sludge and debris from defendant's mine into plaintiff's mill pond. The Missouri Supreme Court treated the nuisance created by the accumulation of sludge and debris in the mill pond as permanent, and allowed recovery of damages for the diminished value of plaintiff's property, or the cost of

removing the debris from the mill pond, whichever sum might be less. The following passage contains a good survey of the Missouri authorities.

> "It (the deposit in the mill pond) is not a structure upon defendant's land or a process of operation going on upon defendant's land, but a deposit upon plaintiffs' land, which plaintiffs cannot by judicial process compel defendant to remove.
>
> *In Hanlin* v. *Meat Co., supra,* the defendant, operating a meat packing plant, emptied into a stream running over plaintiff's land offensive substances and fluids, which polluted the stream, and destroyed a well adjacent thereto. It was held that pollution of the stream could be abated by the defendant, and was of a temporary nature, but also held that the injury to the well was permanent because it had been destroyed.
>
> In *Kelly* v. *City of Cape Girardeau, supra,* the plaintiff's complaint was the overflow of his property by surface water from a sewer. He was permitted to bring successive actions. The ground upon which the injury was held temporary was, that the cause of it was not permanent in a legal sense, but could be abated by the city, by the enlargement of drainage pipes or diversion of the water.
>
> *Ivie* v. *McMunigal* was a case where the complaint was of damage from smoke, cinders and dirt falling upon plaintiff's dwelling house from defendant's foundry. Permanent damages were held to be not recoverable on the ground that it was a nuisance such as could be removed the day after verdict, or could be abated by the order of a competent court, or, if continued, a second or third action for damages was maintainable.
>
> In *Schoen* v. *Kansas City,* the injury complained of, pollution of the water of a stream by emptying a sewer therein, was the result of a temporary delay

in the construction of a sewer. The ruling proceeded upon the theory that the cessation of the work was not permanent, and that when the work should be continued the nuisance would cease.

In *Pinney* v. *Berry*, the plaintiff complained of the erection and maintenance of a dam across a creek which caused the water to flow up a branch on plaintiff's land, cutting off communication with a part of his land, filling the branch with mud, leaves, etc., and creating a nuisance which injured the health of his family. The plaintiff was permitted to prove that his property was rendered less valuable per acre and that a spring was destroyed, and the value of the spring. The petition contained no allegation as to the destruction of a spring, and objection to the evidence was made upon that ground. No instructions were asked or given by either party. It was ruled that the trial court erred in allowing the plaintiff to prove the value of his land before and after the creation of the nuisance. After stating what was said to be the rule of damages for negligent injury to real property the court said: 'But it is obvious that this rule has no application to such nuisances as may be removed the day after the verdict, or for the continuance of which a second or third action may be maintained, or which may be abated at the instance of the injured party by the order of a competent court.'"

Citations of the cases digested in the foregoing passage are:

Hanlin v. *Meat Co.*, 174 Mo. App. 462, 160 S. W. 547 (1913).
Kelly v. *City of Cape Girardeau*, 284 S. W. 521 (1926) (not officially reported).
Ivie v. *McMunigal*, 66 Mo. App. 437 (1896).
Schoen v. *Kansas City*, 65 Mo. App. 134 (1896).
Pinney v. *Berry*, 61 Mo. 359 (1875).

Thus the distinction between a permanent nuisance and a temporary nuisance turns upon whether or not the abatement can be effected by acts to be done by defendant, under judicial compulsion, if necessary, at the source of the nuisance. In the Blankenship case, *supra*, the court probably could not order by mandatory injunction that the defendant go upon plaintiff's land and remove the sludge and debris from the mill pond. On the other hand, in the Kelly case and the Pinney case, *supra*, as in the case at bar, the defendant can "the day after verdict" abate the nuisance by immediate action lying within the power of the defendant. The nuisance in the case at bar could be removed almost immediately by cessation of the outflow from the sewer plant into the watercourse. Therefore, it is a temporary nuisance. The nuisance in the Blankenship case, consisting of a permanent deposit in the mill pond on plaintiff's land, could not be immediately abated. In the case at bar an injunction against the city will for all practical purposes terminate the nuisance. In the Blankenship case an injunction against further discharge of slag and debris from the mine would not have cured the permanent solid deposits of such matter that had already accumulated in plaintiff's mill pond; therefore the nuisance was permanent.

In *Kelly* v. *City of Cape Girardeau, supra*, a second action for damages caused by overflow from the city's storm sewer was instituted. The plaintiff had recovered damages in a prior action and after that recovery an improvement had been made in the drainage system. In the second action plaintiff claimed further damages from overflow despite the improvement. The court held the nuisance temporary, and permitted the maintenance of the second action. The court said:

"It appears that the cause of the overflow is not permanent in a legal sense. It could be abated by the enlargement of the discharge pipes or the diversion of the water, and when this is true the wrong will be treated as temporary in character. *Carson* v. *City of Springfield*, 53 Mo. App. 289; *Foncannon* v. *City of Kirksville*, 88 Mo. App. 279; *Schoen* v. *Kansas City*, 65 Mo. App. 134; *Scott* v. *City of Nevada*, 56 Mo. App. 189; *Lewis* v. *City of Springfield*, 142 Mo. App. 84, 125 S. W. 824; *Howard County* v. *Railway*, 130 Mo. 652, 32 S. W. 651; *White* v. *City of Springfield*, 189 Mo. App. 228, 173 S. W. 1090.

The first suit was filed within 5 years from the date of the completion of the work of the street which is charged to have caused this condition, and the present suit was filed within 5 years of the date of the first suit. If the conditions existing were illegal and abatable—that is to say, if the nuisance is subject to abatement by order of a competent court—then the plaintiff has a right to successive actions from damage resulting therefrom."

It is apparent that the nuisance in the case at bar is temporary. The real question is whether the plaintiff must be left to a series of actions at law or may have injunctive relief. The record shows, and the courts have found, that the city has not employed reasonable and usual means to reduce its sewage. Under such circumstances there is no doubt of the power of a court of equity to enjoin the nuisance.

In *Fisher* v. *American Reduction Co.*, 189 Pa. 419, 42 Atlantic 36 (1899), the plaintiff sought to enjoin the operation of a reduction plant. The plant was constructed and operated under contract with the city of Pittsburgh. The plant was located in the most unobjectionable place that could be found within the city limits.

and operated efficiently as possible with the type of equipment available. It appeared, however, that noxious odors could be reduced by additional equipment which would make for a speedier reduction of the sewage. The court entered a mandatory injunction ordering the defendant to dispose of the garbage as fast as it was brought to the spot, and take other practical steps which would render the operation of the plant less objectionable.

In *Munk* v. *Columbus Sanitary Works,* 7 Ohio N. P. 542, 5 Ohio D. E. C. 548 (1897), the court found that the defendant in the operation of a garbage plant was creating a nuisance, and a decree was entered restraining the defendant from so operating the plant as to cause the injuries complained of. The operation of the order was postponed until a fixed date in the future and the defendant was directed in the meantime to make such alterations in the plant that it could be operated without creating the nuisance, with the further provision that if the defendant did not at once, in good faith, take steps to prevent the nuisance, the injunction would become effective immediately.

In *Simpson* v. *Dupont Powder Co.,* 143 Ga. 467, 85 S. E. 344 (1915), a municipal corporation was proceeding under contract with a crematory company to erect an incinerator for the consumption of the garbage of the city. The erection of the crematory was in progress when a suit was filed in which it was established that the location of the incinerator at the point selected would create a nuisance injuring residents in the community by causing offensive odors, and the gathering of flies in the vicinity. It was shown that other locations were available for the incinerator in which injury would not be done to property owners. The completion of the crematory was enjoined.

In *Block* v. *Baltimore,* 149 Maryland 39, 129 Atlantic 887 (1925), suit was brought by adjoining land owners against the city and the owners of a garbage reduction plant. The plaintiffs in their bill alleged that nearby waters were so polluted as to be of no use for any purpose, and that surrounding territory was rendered almost uninhabitable by odors emitted from the plant. It was held that since the plaintiffs suffered special damage and there was no adequate remedy at law, they were entitled to the injunction.

In *State ex rel. Board of Health* v. *White,* 90 N. J. Eq. 621, 110 Atlantic 43 (1919), it appeared that the defendant had contracted with the city of Asbury Park to remove its garbage. He hauled the garbage to his sixty-acre farm some distance from the populous section, and there cooked or steamed the garbage and fed it to his pigs. Plaintiff complained of the nauseating odors. Injunction was granted.

In some of the cases injunction was granted against disposal of municipal sewage or garbage regardless of a showing as to whether the city was using every means reasonably available to avoid a nuisance. We do not seek to go that far in the case at bar. The whole burden of plaintiff's testimony at the trial was to show that there are effective means for the reduction of sewage which leave the effluent clear, colorless, odorless, and nonputrescent. The effluent from such a plant will not create a nuisance, even in a very small watercourse. The principle for which we contend and the one adopted by the courts below is that a city must exercise its function of sewage disposal in a reasonable manner and if it is creating an unnecessary nuisance by failure to adopt reasonable means for disposal, injunction will lie. Failure to apply this principle would leave with the city

the power of arbitrary and oppressive conduct toward land owners in the environs. For example, the city of Harrisonville in the case at bar might have constructed a plain tank of concrete consisting of four walls and a bottom. Sewage flowing into such a tank and out into the watercourse would undergo but slight reduction. The Imhoff Tank in question is merely a modification of such a structure so designed as to retard the flow of sewage for a period during which a process of settling occurs. The ease and efficiency with which sewage may be *completely* reduced makes such a structure an unreasonable method for the reduction of sewage. If the city had used available methods, methods which are in general use; methods which can still be applied without abandoning the partially effective structure now in existence, then there might be a question concerning the right of the plaintiff to enjoin the trespass. The city has not used reasonable means.

The principle for which we contend is not a limitation upon the power of eminent domain. Any power is subject to such limitations as are involved in its reasonable exercise. It is the function and the power of the courts to determine those limitations. This would be true in the case at bar if the city had exercised a power of eminent domain to condemn the watercourse in question. The fact is that the city did not proceed by condemnation (R., p. 7), although it could have done so under Section 7023, R. S. Mo. 1929, which is as follows:

> "The board of aldermen may make regulations and pass ordinances for the prevention of the introduction of contagious diseases in the city, and for the abatement of the same, and may make quarantine laws and enforce the same within five miles

> of the city. They may purchase or condemn and hold for the city, within or without the city limits, within five miles therefrom, all necessary lands for hospital purposes, waterworks, sewer carriage and outfall, and erect, establish and regulate hospitals, workhouses, poorhouses, and provide for the government and support of the same, and make regulations to secure the general health of the city, and to prevent and remove nuisances: *Provided, however*, that the condemnation of any property outside of the city limits shall be regulated in all respects as the condemnation of property for railroad purposes is regulated by law; *and provided further*, that the police jurisdiction of the city shall extend over such land and property to the same extent as over public cemeteries, as provided in this article."

Even if the city had exercised this power, it would have been subject to the limitation involved in reasonable and adequate methods of sewage reduction. The power of eminent domain is not the power to be arbitrary or negligent.

II.

The Financial Ability of the City to Comply with the Decree.

(A) Bonding Power.

Petitioner assumes that the cost of complying with the injunction against "discharge of putrescible sewage matter" into the watercourse will be $25,000.00 or $30,000.00. This assumption is based upon the estimated cost of certain types of complete sewage disposal given by respondent's engineer in the course of his description of usual methods of complete sewage disposal (R. 51, 52). Petitioner introduced no evidence at the trial

as to cost of complete sewage disposal. Indeed the petitioner at the trial was somewhat equivocal in tendering a plea of municipal poverty as an excuse for maintaining the nuisance. This colloquy occurred (R. 99, 100):

> "The Court: Let's get at the point here. Are you trying to show the City of Harrisonville is poor?
>
> Mr. Barnett: Yes, sir, not only poor, but that it may not, within the limits of the law, by the sale of additional bonds get the money to build this secondary plant. Our purpose in this testimony is to show the court what the financial condition is of the City. Of course, whether or not the City can or cannot create greater indebtedness after that is a question of law, regulated by the Constitution and the statutes, but this is to give the court the facts about our present financial condition.
>
> The Court: Now is it your statement that the City could encroach unreasonably upon the land of a property owner and then defend its conduct, justify it, upon the ground that it was not financially able to do a reasonable thing?
>
> Judge Glenn: No, Your Honor, it is not.
>
> The Court: In other words, that a poor town could do an unreasonable thing and a rich town could not.
>
> Judge Glenn: We do not take that position, but this: If it is possible for this court to make an order for us to put an additional plant in there, this court would have to take into consideration the fact that —whether we have exceeded our constitutional limit of indebtedness before the court could force us to do it; in other words, if the court could force us to do something the Constitution said we couldn't. But as to the damage we have done, the party can sue us and get a judgment and the court can cause a levy in addition to a constitutional limit, but the City can't vote a bonded indebtedness.
>
> The Court: I understand the theory that you can

pay damages, but you can't arrange to prevent damages, is that it?

Judge Glenn: This other way, we would have to vote bonds to do this, and we have exceeded our constitutional limit—that is, we haven't exceeded it, but we have already bonded the City to the maximum.

The Witness: Section 12 gives five per cent for the building of sewers. We have now under that five per cent some $42,500.00."

Thus the petitioner at the trial disavowed an intent to shield a wrong behind poverty, but urged that the City was incapacitated by an exhausted bonding power. It now appears by petitioner's admission that the City can raise at least half of the minimum estimated cost of one of the suggested methods of abating the nuisance by use of bonding power (petitioner's brief, p. 51).

Let us examine other methods available to the City.

(B) Special Public Sewer Tax.

One of the several methods of paying for the construction of a disposal plant is provided by Section 7031, Revised Statutes of Missouri 1929, which is as follows:

"The board of aldermen shall have power to cause a general sewer system to be established, which shall be composed of three classes of sewers, to-wit: Public, district and private sewers. Public sewers shall be established along the principal courses of drainage, at such points, to such extent, of such dimensions and under such regulations as may be provided by ordinance, and these may be extensions or branches of sewers already constructed, or entirely new throughout, as may be deemed expedient. The board of aldermen may levy a tax on all property made taxable for state purposes over the whole city, to pay for the constructing, reconstructing and re-

> pairing of such work, which tax shall be called 'special public sewer tax,' and shall be such amount as may be required for the sewer provided by ordinance to be built; and the fund arising from said tax shall be appropriated solely to the constructing, reconstructing and repairing of said sewer."

It is expressly held that this statute applies to a plant for the *disposal* of sewage as well as to lines and mains for the *collection* of sewage. *Schueler* v. *City of Kirkwood,* 191 Mo. App. 575, 177 S. W. 760 (1915).

The comprehensive nature of the statutory power will be noted; especially the power to levy the tax for *reconstruction* or *repair* of an existing general sewer system. The statute is clearly applicable to the case at bar.

Counsel for petitioner erroneously state that the foregoing statute has been held unconstitutional (petitioner's brief, p. 52). The case of *Union Trust Co.* v. *Pagenstecher,* 221 Mo. 121, 119 S. W. 1103 (1909), does not hold the statute unconstitutional; it holds that a tax of $2.50 per $100 levied in that case was invalid because not submitted to vote of the people under Sec. 11, Art. 10 of the Constitution of Missouri. The court holds the special public sewer tax to be a general municipal tax. Therefore the provision of the constitution above cited was applicable. Under that constitutional provision, no tax in excess of fifty cents on the hundred dollars valuation can be levied in a city of the class in question *unless* such excess be authorized by two-thirds of the qualified voters. In the Union Trust Co. case the matter of the tax had never been submitted to the voters at all. Hence, the tax, but not the statute, was invalid.

This point must be well noted, otherwise petitioner's erroneous statement that the statute is unconstitutional will be confusing.

The City of Harrisonville is at perfect liberty today to submit to the voters of the City of Harrisonville a proposition to reconstruct or repair the City's disposal plant, and two-thirds of the qualified voters may authorize the board of alderman to levy whatever tax may be submitted for that purpose.

The following quotation from the Union Trust Co. case, *supra,* gives the pertinent provisions of the Missouri Constitution and the holding of the court:

> "The section (Sec. 11, Art. 10, Mo. Const.) so far as applicable, reads: 'In cities and towns having less than ten thousand and more than one thousand inhabitants, said rate shall not exceed fifty cents on the hundred dollars valuation; * * * provided, * * * for the purposes of erecting public buildings in * * * cities * * * the rates of taxes herein limited may be increased when the rate of such increase and the purpose for which it is intended shall have been submitted to a vote of the people, and two-thirds of the qualified voters of such * * * city * * * voting at such election, shall vote therefor.'"

The court then concluded that "before a legal tax in excess of fifty cents on the hundred dollars can be levied the question must receive the approval of two-thirds of the qualified voters who vote at an election held for that purpose." The court construes the phrase "public buildings" to mean "public works." See *Battle* v. *Willcox,* 128 S. C. 500, 122 S. E. 516 (1924).

Petitioner speaks as if the Missouri Constitution imposed an absolute limitation upon the City in the matter of raising funds. Such is not the case. The constitution simply prohibits a tax rate in towns of petitioner's class of more than fifty cents per hundred dollars of valuation

unless two-thirds of the voters approve for specified purposes.

The existing litigation is controlled, of course, by the city officials and their counsel. They have elected not to submit to the voters of the City a proposal to abate the unnecessary nuisance. Until they do that, the petitioner cannot urge in this court or any other court a matter of financial inability. The City officials should not assume that the voters wish to perpetuate the stench and pollution in the watercourse. They should assume that the voters would take seriously the trial court's statement that (R. 182):

> "The City in the exercise of its function should be anxious to avoid disposing of its sewage in such way as to occasion needless harm and injury to the people who hold property in its environs."

(C) Special Assessments.

Petitioner confuses this method with the special public sewer tax discussed in (B) just above.

Sec. 7038, Revised Statutes of Missouri 1929, is as follows:

> "Whenever the city shall deem it necessary, it may, by ordinance, provide for the construction of a septic tank or other sewage reduction device for the purpose of purifying the discharge from any district or joint district sewer. In such case the cost thereof shall be assessed against the lands in the district or joint district for which the same is provided in the same manner as is provided for the assessing of the cost of district sewers."

This statute provides a third method. A disposal plant may be constructed and paid for by special assessments levied upon a benefit district. The benefit district may

comprise several district sewers; indeed, all the district sewers in "the natural drainage area." (See Sec. 7037, R. S. Mo. 1929, Appendix B.) See also *Farmers & Merchants Trust Co.* v. *Hillcrest Realty Co.*, 285 Mo. 552, 234 S. W. 1023 (1920).

Counsel for petitioner stated in oral argument in the Eighth Circuit Court of Appeals that the sewer system of Harrisonville is a public sewer system. However that may be, the statute in question clearly gives the power to the City to lay out the City into districts or joint districts for the purpose of collecting the sewage into a disposal plant, and to levy benefit assessments against those districts or joint districts to pay for the improvement. The fact that the original sewer mains may have been laid as a public sewer system would not preclude dividing the city into districts for disposal purposes.

(D) General Revenue.

By authority of Sec. 7276, Revised Statutes of Missouri 1929 (quoted in petitioner's brief, p. 13), the City may acquire a sewage disposal plant and pay therefor out of general revenue over a ten-year period. Petitioner contends that the general revenue of the City is insufficient for that purpose. Petitioner states that the City's general revenue is only $6,000.00 per annum (petitioner's brief, p. 50). We find no support in the record for this statement. The record (pp. 102-107) contains statement of certain accounts, but a careful examination fails to disclose any showing as to amount of general revenue for any period whatever.

Petitioner argues that the general revenue must be first applied to paying the City's "general operating expense" (petitioner's brief, p. 51). There is, however, no showing in the record of the amount of fixed operat-

ing expenses of the City. Petitioner cites *Anderson* v. *Ripley County*, 181 Mo. 46, 80 S. W. 263 (1904) (petitioner's brief, p. 51). That case dealt with a statute prescribing the purposes for which the revenues of a *county* should be applied. Petitioner cites no authority controlling disposition of funds of the City in this case.

There is nothing in the record to show that the City may not manage its finances in such manner as to provide the funds for this method. Of course it is easy for the City officials to believe the task impossible because, evidently, they have no will for the job. On the other hand they did not hesitate recently to spend $100,000.00 for a water plant (R. 102, 108).

Furthermore, with respect to raising funds to make payments under the contract authorized by Section 7276, *supra,* the City is not limited to its constitutional power to levy taxes at the rate of 50c per hundred; neither would the total sum that might fall due within the period of that contract constitute an indebtedness within the meaning of Article 10, Section 12, of the Constitution of Missouri. *Lamar Water and Electric Light Company* v. *City of Lamar,* 128 Mo. 188, 26 S. W. 1025 (1894).

In that case a city of the fourth class entered into a contract with respect to a water works. The contract called for 20 annual payments of $3,000.00. For the purposes of meeting the annual payments, the City levied a tax "not exceeding 40c on the $100.00 valuation on all taxable property in the City, * * *." This tax of 40c per hundred dollars valuation was in addition to a general tax of 50c per hundred dollars of valuation. The case is a landmark in Missouri, and establishes two propositions:

1. That an annual tax authorized by Section 12, Ar-

ticle 10, of the Missouri Constitution (Appendix C) to retire indebtedness is not within the limitations of Section 11 of Article 10 of the Missouri Constitution limiting the general tax levy to 50c on the $100.00 valuation for cities of the fourth class.

2. That the total sum of a contract indebtedness payable in installments over a period of years is not an indebtedness within the limitation of Article 10, Section 12, of the Missouri Constitution.

In establishing the second point, the court quoted the following passage from Dillon on Municipal Corporations:

> "Under the constitutional provisions in Iowa, Illinois, Indiana and Pennsylvania, referred to, it is held that a corporation may make a contract (at least for necessaries) covering a series of years, upon which an obligation to pay may arise from year to year as the thing contracted for is furnished, and in such case, *the whole amount* which may ultimately become due *does not constitute a debt* within the constitutional prohibition. But in order to ascertain whether the corporation by such contract is transgressing the limit, regard is had only to the amount which may fall due within a certain year or other period; and if the revenues for that year or other period are sufficient, over and above the payment of the other expenses, to pay such amount, there is no debt incurred within the constitutional prohibition.' 1 Dillon's Municipal Corporations (4 Ed.), 1890, Sec. 136a."

In *Saleno* v. *The City of Neosho,* 127 Mo. 627, 30 S. W. 190 (1895), a contract by a city to pay a fixed price annually for 20 years for water was held not to create an indebtedness for the total sum of the 20 annual pay-

ments within the limitations of Section 12, Article 10, of the Missouri Constitution.

It may be argued by petitioner that in both of the cases *supra* the contracts with respect to water were contracts for services rather than for the acquisition of properties. We need not consider whether that would be a sound distinction for the reason that the contract which the City is authorized to make under Section 7276, Revised Statutes of Missouri 1929 (quoted in full in petitioner's brief, p. 13), empowers the City to "provide for the gathering, handling and disposition, either by itself or by contract with others for the gathering, handling and disposition of * * * refuse matter and municipal waste * * *; to acquire by purchase, construction, *lease*, gift or otherwise within or without the corporate limits of such cities an incinerator or incinerators for the destruction of such * * * refuse matter and municipal waste; to acquire by *any of such means* a purification plant or plants or sewage disposal plant for the purification of all sewage accumulating in such cities." (Italics ours.)

Thus within the exact terms of the statute, the City in the case at bar may lease rather than acquire ownership of the necessary sewage disposal facilities and in that manner bring itself within the exact facts which were involved in the Lamar case and the Neosho case, *supra*.

If we were advising the City of Harrisonville, we would advise the City that it could contract for the construction of necessary sewage disposal facilities to be paid for in ten annual installments, or it could contract by lease or otherwise for a service of sewage disposal to be provided by private enterprise.

The function of sewage disposal is frequently performed by private enterprise for compensation. One rea-

son, among others, for such enterprise is the well known fact that the residue from sewage disposal furnishes a by-product which has commercial value as fertilizer. The contract price, either for acquisition of the plant or to cover lease, rental or service over a period of years (in the latter case the statute does not limit the period to ten years) can be provided by the levy of a tax sufficient to pay the annual installment in each year; and for that purpose the City is not limited to a tax of 50c per $100.00 of valuation.

Let us summarize the powers of the City applicable to a reconstruction or repair of its sewage disposal plant:

(1) The City has by its own admission an available bonding power of $12,583.00, plus the increase in that figure due to retirement of bonds which may have occurred since June 17, 1930, the date of the trial and the date on which petitioner computes the above figure (R. 34, 102; petitioner's brief, p. 51).

(2) The City may submit to the voters a proposal to reconstruct or repair the sewage disposal plant and the voters may authorize whatever general tax is necessary for that purpose.

(3) The City may tax the cost of such improvement as special benefit assessments to the land in joint sewer districts created for that purpose.

(4) The City may contract for the improvement and pay the contract price from general revenues.

Finally there appears to be no reason why a combination of these methods may not be used.

Even if there were doubt concerning the City's powers, the officials should not at this stage resolve such doubt against the trial court's decree. They should first make the attempt to comply, and if blocked by some legal barrier

present that matter to the trial court where jurisdiction for such purposes was expressly reserved (R. 15, 16).

III.

In Any Event the Limitations Upon Financial Powers of the City Probably Do Not Apply to Matters Affecting Compliance with the Decree.

Limitations of the amount of municipal indebtedness apply only to debts created by voluntary act or contract, and not to obligations or liabilities imposed upon the corporation by law or against its will; 44 C. J. 1127.

It is well established in Missouri that a judgment against a municipality for a tort liability can not be defeated by pleading that the city has exhausted its debt making power.

In *Connor* v. *City of Nevada,* 188 Mo. 148, 86 S. W. 256 (1905), a judgment was rendered against the city for personal injuries occasioned by failure of the city to properly maintain a public street. The city pleaded that under the terms of Sections 11 and 12 of Article 10 of the Constitution of Missouri the debt making and taxing power of the city had been exhausted, and therefore the city could not be made liable for additional indebtedness. The court in rejecting the contention said:

> "The clause of the constitution in question deals with the subject of incurring indebtedness which arises *ex contractu* and which is very different in its nature from suffering liability for a tort. The language of Section 12 is that the city shall not be allowed to become indebted in any manner or for any purpose to an amount exceeding in any year the income and revenue provided for such year without the assent of two-thirds of the voters thereof voting at an election to be held for that purpose. This

language shows that it is indebtedness incurred by assent, agreement or contract. The word debt has a well recognized meaning in law distinguished from liability for damages. After a claim for damages is reduced to a judgment it becomes, in a technical sense, a debt, but it is a debt imposed by law, not one assumed by contract."

In *State ex rel. Pyle, Administrator,* v. *City of University City et al.*, 320 Mo. 451, 8 S. W. (2) 73 (1928), the city sought to defeat a similar liability upon the same grounds. The contention was again rejected. The court said:

"Suits against municipalities, based on negligence, involve wrongful acts, whether of omission or commission. It was said in *Conner* v. *Nevada, supra*: 'A city cannot escape liability from an obligation arising *ex delicto* on the ground that its indebtedness has already reached the constitutional limit.' Again it was there said: 'Then when we turn again to the clause in our constitution on which appellant relies, we see that it refers only to the contracting of debts, and makes no reference to liability for torts; it leaves that matter as the common law left it.' To what then has the statute reference? It speaks of constitutional limits, but it is evident from the cases in this and other states that the constitution does not limit the rate of taxation where a tort is involved. Moreover, municipalities should not escape responsibility for their wrongful acts. Any other construction of the statute might permit them to so escape, and would, if collection of taxes for that purpose was thwarted. The constitutional limitation, as we have held, refers only to debts arising out of contractual relations, leaving the matter as it was at common law."

In *McCarthy* v. *City of Kelso,* 129 Wash. 121, 223 Pac. 151 (1924), it is held that a constitutional limitation

upon debt making power would not apply to excuse the city for failure to comply with an order of the state board of health requiring the construction of a water filtration plant, there being no other method whereby wholesome water could be supplied to the city. The court said:

> "Having held that the constitutional limitation does not apply to an indebtedness for the maintenance of a jail, a quarantine, a fire department, and impounding stock because such indebtedness is necessary for the preservation of property and the safety of the inhabitants, we see no reason why the constitutional limitation should prevent the city from incurring an indebtedness for the construction of a water filtration plant for the preservation of the health and lives of its citizens."

IV.

Comparative Injuries.

Petitioner contends that the alleged cost of improving the Harrisonville sewage plant should be offset against the amount of damages awarded respondent for loss of rents. This argument assumes that the only damage respondent has suffered is the difference between rent actually received for the premises and the theoretical rental value if the water in the stream were unpolluted. The decisions cited in this brief make frequent reference to the impossibility of determining accurately the injury suffered by a landowner from pollution in a stream and from noxious odors, gases and fumes. Damages caused by such nuisances include such intangible factors as discomfort, inconvenience and annoyance, *Baltimore and Potomac Railroad Company* v. *Fifth Baptist Church,* 137 U. S. 568, 11 S. Ct. 185, 34 L. Ed. 784 (1891). Indeed it is the very impossibility of adequately fixing compen-

sation in money for the injuries received from such sources which furnishes one ground for equitable jurisdiction.

The real measure of respondent's damage is the substantial destruction of a fine stock farm so long as the watercourse remains contaminated and polluted.

Furthermore, the doctrine of comparative injuries or balanced equities does not obtain in Missouri. In the case of *State ex rel.* v. *Powder Mfg. Co.*, 259 Mo. 254, 169 S. W. 267 (1914), a suit to abate a nuisance, the Missouri Supreme Court disposed of the doctrine in the following language:

> "Counsel for respondents say that we should consider the 'relative advantages and disadvantages to the parties concerned.' If it is meant by that assertion that substantial, certain and irreparable damages to the plaintiff which might be prevented by injunction are to be left without remedy because of the fact that greater damages and disadvantages would result to the defendant, a wrongdoer, by the issuing of the injunction, we are driven to emphatically say no. * * *
>
> 'But we have nothing to do with this question as to the comparative importance of the conflicting interests, or the inconvenience to the defendants by the stoppage of their works, if they infringe the material, substantial rights of others. It is the province and imperative duty of the court to ascertain and enforce the legal rights of the complainant, no matter what the consequence to defendants may be. This duty no court could evade if it would.' "

V.

The Injunction in Question Does not Compel Exercise of Legislative Power.

Petitioner makes the point that "the judiciary may not properly compel exercise of legislative power." Petitioner's argument consists of two false premises. The first erroneous premise is stated as follows: "It must be conceded, therefore, that the decision to build a secondary plant is the exercise of a legislative function" (Petitioner's Brief in support of petition, p. 46). It is far from clear why the above statement should be conceded when the authorities cited by petitioner establish the exact opposite of its statement.

The first authority cited by petitioner in support of its contention that the decision to build a sewage disposal plant is a legislative function, is 44 C. J. 1084, Sec. 4002 (p. 44 of Petitioner's Brief). The passage quoted by petitioner states that some courts have held that the construction of municipal drains and sewers is a corporate or municipal as distinguished from a governmental function, while other courts have held that it is a governmental or legislative function. But the only Missouri case cited by the authors is *Donahoe* v. *Kansas City*, 136 Mo. 657, 38 S. W. 571 (1897), and it is cited in support of the following:

> "Some authorities hold that the construction and maintenance of municipal drains and sewers is a corporate or municipal, as distinguished from a governmental function."

In the Donahoe case a workman brought action against the city to recover damages for injuries received while digging a trench for a sewer. The court held for the

plaintiff on the ground that the maintenance of sewers is a corporate rather than a governmental function. The court said:

> "But as soon as the corporation has determined to construct a public work, it enters upon an undertaking which, in all its details, should be subordinated to the rule requiring the use of care, for the work is then ministerial. (*Ib.*, Sec. 141, p. 267.)
>
> In *Johnston* v. *District of Columbia*, 118 U. S. 21, it is said: 'But the construction and repair of sewers, according to the general plan so adopted, are simply ministerial duties; and for any negligence in so constructing a sewer, or keeping it in repair, the municipality which has constructed and owns the sewer may be sued by a person whose property is thereby injured.'
>
> 'The work of constructing gutters, drains, and sewers is ministerial, and when, as is usually the case, the undertaking is a corporate one, the corporation is responsible in a civil action for damages caused by the careless or unskillful manner of performing the work.' 2 Dillon's Municipal Corporations (4 Ed.), Sec. 1049.
>
> The same rule was announced by this court in *Thurston* v. *St. Joseph*, 51 Mo. 510, and seems to be the general if not uniform doctrine upon this subject.
>
> The sewers of the city are its private property; the citizens are alone interested in them; the general public of the state at large has no interest in them, any more than they have in waterworks when owned by a city, by which its citizens are supplied with water, and in this very important particular differ from the streets of the city, which are for the benefit of the public generally."

It is interesting to note that although petitioner cites a part of Sec. 4002 of 44 C. J. 1084, it omits the part of the same section which reads:

> "Authority to construct and maintain drains and sewers gives no right to create a nuisance, or to construct drains or sewers or discharge sewage upon private lands without permission, or without acquiring the right to do so by lawful means and making due compensation to the landowner for the injuries sustained." (See cases cited in notes 37 and 38.)

The second false premise of petitioner's argument is that the court has ordered the City to erect a new disposal system. From time immemorial it has been the custom of courts of equity to enjoin a result, and to leave it up to the wrongdoing defendant to choose the method of stopping the enjoined result. This was the holding of the Salton Sea cases, 172 Fed. 792 (C. C. A. 9th, 1909), in which the court enjoined the flooding of lands in the United States caused by floodgates maintained by defendants in Mexico. It was conceded that the court had no authority to order the doing of acts in Mexico, but the court stated:

> "Why may not a court restrain a party over whom it has jurisdiction from injuring property within its jurisdiction? How does it affect the question of jurisdiction or venue to say that the party on whom the court must act may find it necessary to do things outside the jurisdiction of the court in order to comply with the order of the court? May this not often happen, and would it not happen oftener, if it were determined that such an excuse was sufficient to defeat the jurisdiction of the court."

Finally, respondent returns in all seriousness to the statement that the petitioner is not required by the decree to do anything except cease the discharge of putrescible sewage matter into the watercourse. Petitioner is offended by the suggestion that the people of Harrisonville may return to private disposal if they do not wish to maintain a general disposal plant complying with standard specifications. Petitioner says that this thought is "so abhorrent to one's sense of the requirements of social and community life that it scarcely requires further comment." We wonder if the thought of human excreta, visible in the stream, foul odors and noxious gases, constantly offensive, is at all abhorrent to the petitioner. There is great force in the statement of the trial judge (Albert L. Reeves) that the City of Harrisonville should not wish to dispose of its sewage in such a way as to do harm and injury to persons living in the environs. We submit that this court will take cognizance of the fact that the trial judge, in all probability, is quite familiar with local situations in Missouri, and that he knew full well that the City of Harrisonville was trying to do a thing which other similar cities have avoided doing. The City is trying to make respondent's pasture land a part of its sewage disposal plant.

VI.

The decisions of the courts below upon questions of fact and matters of discretion will not be disturbed on certiorari.

The courts below have found the existence of the nuisance, and that by means, reasonably available, it may be abated. Such findings of fact will not ordinarily be disturbed on review in this court. *Bochmer* v. *Pennsylvania R. Co.*, (N. Y. 1920) 40 S. Ct. 409, 252 U. S. 496,

64 L. Ed. 680; *Fireball Gas Tank & Illuminating Co.*, (Mo. 1915) 36 S. Ct. 86, 239 U. S. 156, 60 L. Ed. 191; *The Linseed King*, (N. Y. 1932) 52 S. Ct. 450, 285 U. S. 502, 76 L. Ed. .....

Likewise the determination of the courts below upon any pertinent question of comparative injury will not ordinarily be disturbed by this court. Such determination is a matter of discretion. *Smith* v. *Staso Milling Co.*, 18 F. (2d) 736.

Conclusion.

Petitioner admits the existence of the nuisance. The admission involves all that the record shows as to a condition of gross pollution in the watercourse on respondent's land. Petitioner admits that reasonable means in general use are available for abating the nuisance. Petitioner's chief defense is that the City has no financial power to raise the funds involved in remodeling the sewage system. The ground for review upon certiorari under this head is an alleged conflict between the decision of the United States District Court for the Western District of Missouri and the Eighth Circuit Court of Appeals, and a decision of the Supreme Court of Missouri (*Union Trust Co.* v. *Pagenstecher*, 221 Mo. 121, 119 S. W. 1103 [1909]).

We have shown that that case did not hold the statute authorizing a Special Public Sewer Tax unconstitutional, but simply held a *tax* levied under that statute in that case invalid because the matter had not been submitted to a vote, as required by Section 11, Article 10 of the Constitution of Missouri. The trial court and the appellate court did not even mention the Special Public Sewer Tax in rendering the decision, but if that method of raising

revenue had been expressly relied upon there would have been no conflict. Furthermore, we have shown three other financial methods by which funds could be raised for sewage disposal purposes. Therefore that ground for certiorari must fall.

The petitioner states that the question of what constitutes a permanent as distinguished from a temporary nuisance is of such great importance that this court should pass upon it. We have shown that the real question is whether a city may maintain a method of sewage disposal, however inadequate, and however injurious to adjoining property owners, and escape all supervision by courts of equity on the theory that the injured property owner may have an action at law for damages. We have shown that in the case at bar such a cause of action is now barred by the five-year statute of limitations in Missouri. However, this unfortunate result to the respondent in this case would probably not be a controlling factor. If the question proposed by petitioner is one of great importance, then the factor which we believe will control this court is the following:

If an equity court has no supervisory power, then any municipality may create any kind of unnecessary nuisance in the way of sewage disposal, taking the chance that a jury in a suit for damages would be lenient so that the cost of the inadequate and improper disposal method plus the damages to be paid for projecting raw sewage onto private property, would amount in the aggregate to less than a sufficient and proper disposal plant would cost. We do not believe that this court will announce a rule which will make that the controlling factor in determing what type of sewage disposal plants municipalities shall construct. If the question is important enough to be settled by this court, then the equitable jurisdiction which

the trial court and the appellate court have exercised should be confirmed. The results of such a rule will be salutary and will look solely toward the construction of sewage disposal facilities which will not unnecessarily injure private property owners and will tend to clean, wholesome, sanitary conditions in the environs of municipalities.

Petitioner urges that the decree encroaches upon the legislative function. We have shown that the municipal function of sewage disposal is not legislative. But even if it were, it cannot be exercised so as to create a nuisance. A judicial decree finding the existence of such a nuisance and enjoining it does not encroach upon the legislative function.

Petitioner urges that the courts below should have balanced inconvenience to the municipality against the damage to the respondent. We have shown that the Missouri courts do not subscribe to such a doctrine. Even if the doctrine obtained in Missouri, review of such a matter of discretion is not the purpose of a writ of certiorari.

Respectfully submitted,

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APPENDIX A.

"Sec. 860. *Period of Limitation Prescribed.*—Civil actions, other than those for the recovery of real property, can only be commenced within the periods prescribed in the following sections, after the causes of action shall have accrued: * * *

Sec. 862. *What Within Five Years.*—Within five years: First, all actions upon contracts, obligations or liabilities, express or implied, except those mentioned in Section 861, and except upon judgments or decrees of a court of record, and except where a different time is herein limited; second, an action upon a liability created by a statute other than a penalty or forfeiture; third, an action for trespass on real estate; fourth, an action for taking, detaining or injuring any goods or chattels, including actions for the recovery of specific personal property, or for any other injury to the person or rights of another, not arising on contract and not herein otherwise enumerated; fifth, an action for relief on the ground of fraud, the cause of action in such case to be deemed not to have accrued until the discovery by the aggrieved party, at any time within ten years, of the facts constituting the fraud." (Revised Statutes of Missouri, 1929.)

APPENDIX B.

"Sec. 7037. Joint District Sewers. Whenever the city may deem it necessary that a sewer should be constructed or reconstructed in any part of the city containing two or more sewer districts, it may, by ordinance, unite such sewer districts into a joint sewer district and cause a sewer to be constructed therein in like manner in all respects as is provided in Section 7032, in case of district sewers, and should the board of aldermen, by ordinance, unite two or more sewer districts into a joint sewer district for the purpose of constructing a joint district sewer therein, the action of the board of aldermen shall be conclusive for all purposes, and no special tax-bill shall be held invalid or be affected on account of the included drainage area thereof, or the size, character or purpose of such sewer: Provided, however, that no sewer district shall be included in such joint district which is not contained in the natural drainage area of the valley or watercourse in which joint district sewer is proposed to be constructed." (Revised Statutes of Missouri, 1929.)

APPENDIX C.

"No county, city, town, township, school district or other political corporation or subdivision of the State shall be allowed to become indebted in any manner or for any purpose to an amount exceeding in any year the income and revenue provided for such year, without the consent of two-thirds of the voters thereof voting on such proposition, at an election to be held for that purpose; nor in cases requiring such assent shall any indebtedness be allowed to be incurred to an amount including existing indebtedness, in the aggregate exceeding five per centum on the value of the taxable property therein, to be ascertained by the assessment next before the last assessment for State and county purposes, previous to the incurring of such indebtedness, * * * *and provided further,* that any county, city, town, township, school district or other political corporation or subdivision of the State, incurring any indebtedness requiring the assent of the voters as aforesaid, shall before or at the time of doing so, provide for the collection of an annual tax sufficient to pay the interest on such indebtedness as it falls due, and also to constitute a sinking fund for the payment of the principal thereof, within twenty years from the time of contracting the same: * * *."
(Sec. 12, Art. 10, Missouri Constitution.)

SUPREME COURT OF THE UNITED STATES.

No. 559.—October Term, 1932.

City of Harrisonville, Missouri, Petitioner, *vs.* W. S. Dickey Clay Manufacturing Company.	On Certiorari to the United States Circuit Court of Appeals, for the Eighth Circuit.

[May 8, 1933.]

Mr. Justice Brandeis delivered the opinion of the Court.

W. S. Dickey Clay Manufacturing Company, a Delaware Corporation, owns a stock farm of 300 acres lying near the sewage disposal plant of the City of Harrisonville, Missouri. A small, meandering, intermittent stream called Town Creek flows through a detached portion of the farm, consisting of 100 acres, devoted solely to pasturage. Since 1923, a drain pipe has discharged into the creek, at a point in the pasture, the effluent from the disposal plant of the City's general sewage system. In 1928, the Company brought, in the federal court for western Missouri, this suit against the City, alleging injury to the property through drainage of the effluent from the disposal plant and seeking both damages and an injunction. The land was acquired by the Company in 1925 and has been leased ever since. Prior to 1925 it was owned by W. S. Dickey, the president and majority stockholder of the Company, who is a resident of Missouri. Jurisdiction of the federal court is based solely on diversity of citizenship. No federal question, constitutional or statutory, is involved.

The disposal plant consists of an Imhoff tank and the drain. It was installed by the City in 1923, after conference with the Public Health Department of the State; and has since been in continuous use. The tank is a primary method of sewage disposal which removes only sixty per cent of the putrescible organic matter. An additional plant for further treatment of the sewage, which would have removed thirty per cent more of such matter, could

have been installed in 1923. But such additional treatment was not then common in Missouri; nor was it then recommended by the Health Department. In 1928, additional treatment of the sewage was recommended by it; but was not required. The population of the City is 2000; but only about 1400 of the inhabitants are served by the general sewage system. The cost of the general sewage system and disposal plant was about $60,000. The cost of a secondary disposal plant would be $25,000 to $30,000. It is asserted by the City that it cannot erect such a plant now because it has no surplus revenues and its borrowing capacity is nearly exhausted.

The District Court found that the detached portion of the Company's land used for pasturage is seriously affected by the pollution of Town Creek; that the aggregate loss in rental for the five years during which it owned the land had been $500; and that it would cost $3500 to restore the creek to the condition existing prior to the nuisance. The court, therefore, awarded damages in the sum of $4000. It held, also, that the Company was entitled to an injunction; but allowed the City six months within which to abate the nuisance by introducing some method that would prevent the discharge of putrescible sewage into the creek. Upon an appeal by the City, the Circuit Court of Appeals modified the decree by eliminating therefrom the item of $3500 damages. As so modified the decree was affirmed. 61 F. (2d) 210. The Company acquiesced in the modification; and in this Court the City did not question the propriety of the award of $500 damages. But, on the ground that the injunction should have been denied, it petitioned for a writ of certiorari, which was granted. 287 U. S. —.

The City contends that the injunction should not issue, because, according to the law of Missouri, the sewer system and disposal plant constitute a permanent nuisance; that in granting the injunction instead of requiring the Company to seek damages for the depreciation of the property, the federal courts acted in direct conflict with the law of the State; and that since the question involved is in essence the extent of rights incident to ownership of real property, the state law is controlling. The Company denies that under the decisions of the state courts the nuisance is to be deemed a permanent one; and insists that for this continuing nuisance the remedy of damages is inadequate.

First. The discharge of the effluent into the creek is a tort; and the nuisance, being continuous or recurrent, is an injury for which an injunction may be granted. Thus, the question here is not one of equitable jurisdiction. The question is whether, upon the facts found, an injunction is the appropriate remedy. For an injunction is not a remedy which issues as of course. Where substantial redress can be afforded by the payment of money and issuance of an injunction would subject the defendant to grossly disproportionate hardship, equitable relief may be denied although the nuisance is indisputable. This is true even if the conflict is between interests which are primarily private. Compare *Parker* v. *Winnipiseogee Lake Cotton & Woollen Co.*, 2 Black 545, 552-553.[1] Where an important public interest would be prejudiced, the reasons for denying the injunction may be compelling.[2] See *Osborne* v. *Missouri Pacific Railway*, 147 U. S. 248, 258, 259; *New York City* v. *Pine*, 185 U. S. 93, 97; *Cubbins* v. *Mississippi River Commission*, 204 Fed. 299, 307.[3] Such we think is the situation in the case at bar.

[1]See also McCarthy *v.* Bunker Hill & Sullivan Mining Co., 164 Fed. 927, 940; Bliss *v.* Washoe Copper Co., 186 Fed. 789; Sussex Land and Live Stock Co. *v.* Midwest Mfg. Co., 294 Fed. 597, 604-605; Smith *v.* Staso Milling Co., 18 F. (2d) 736; De Blois *v.* Bowers, 44 F. (2d) 621. In these cases the interest of the community was incidentally involved. See, however, cases of physical occupation of the land, constituting a continuing trespass, where the plaintiff was confined to an action for damages because the injury was small and an injunction would have imposed a great burden on the defendant. *E. g.*, Coombs *v.* Lenox Realty Co., 111 Me. 178; Lynch *v.* Union Institution for Savings, 159 Mass. 306; Hunter *v.* Carroll, 64 N. H. 572; Crocker *v.* Manhattan Life Ins. Co., 61 App. Div. 226. Compare Kershishian *v.* Johnson, 210 Mass. 135.

[2]In some other classes of controversies the public interest has been deemed so strong that a general principle of non-interference by injunction has been adopted with respect to them. Compare Act of March 2, 1867, 14 Stat. 475, R. S. § 3224; Giles *v.* Harris, 189 U. S. 475, 486; Near *v.* Minnesota, 283 U. S. 697, 719. Changed conditions in the community may lead a court to deny an injunction where otherwise it would be granted. Texas & Pacific Ry. Co. *v.* Marshall, 136 U. S. 393, 405; Jackson *v.* Stevenson, 156 Mass. 496; Amerman *v.* Deane, 132 N. Y. 355.

[3]Compare Georgia *v.* Tennessee Copper Co., 206 U. S. 230, 238; Hurley *v.* Kincaid, 285 U. S. 95, 104, note 3; York Haven Water & Power Co. *v.* York Haven Paper Co., 201 Fed. 270, 279-280. See also Daniels *v.* Keokuk Water Works, 61 Iowa 549; Simmons *v.* Paterson, 60 N. J. Eq. 385; Daughtry *v.* Warren, 85 N. C. 136; Elliott Nursery Co. *v.* Duquesne Light Co., 281 Pa. 166.

If an injunction is granted the courses open to the City are (a) to abandon the present sewage disposal plant, erected at a cost of $60,000, and leave the residents to the primitive methods theretofore employed, if the State authorities should permit; or (b) to erect an auxiliary plant at a cost of $25,000 or more, if it should be legally and practically possible to raise that sum. That expenditure would be for a desirable purpose; but the City feels unable to make it. On the other hand, the injury to the Company is wholly financial. The pasture land affected by the effluent would be worth, it was said, $50 or $60 an acre if the stream were freed from pollution. Denial of the injunction would subject the Company to a loss in value of the land amounting, on the basis of the trial court's findings, to approximately $100 per year. That loss can be measured by the reduction in rental or the depreciation in the market value of the farm, assuming the nuisance continues; and can be made good by the payment of money. The compensation payable would obviously be small as compared with the cost of installing an auxiliary plant, for the annual interest on its cost would be many times the annual loss resulting to the Company from the nuisance. Complete monetary redress may be given in this suit by making denial of an injunction conditional upon prompt payment as compensation of an amount equal to the depreciation in value of the farm on account of the nuisance complained of. We require this payment not on the ground that the nuisance is to be deemed a permanent one as contended;[4] but because to oblige the Company to bring, from time to time, actions

[4]Where a nuisance to real property results from a structure which is in character relatively enduring and not likely to be abated either voluntarily or by order of a court, it is frequently held that the nuisance is a permanent one; and if the prospective damages resulting therefrom can be estimated with reasonable certainty, the diminution in the value of the property is immediately recoverable as damages. Highland Ave. R. R. *v.* Matthews, 99 Ala. 24; Finley *v.* Hershey, 41 Iowa 389; Town of Troy *v.* Cheshire R. R. Co., 23 N. H. 83; Southern Ry. Co. *v.* White, 128 Va. 517; compare Fowler *v.* New Haven & Northampton Co., 112 Mass. 334, 338-339, Ridley *v.* Railroad, 118 N. C. 996, 1009. In some States the doctrine has been rejected. *E. g.*, Pond *v.* Metropolitan Elev. Ry. Co., 112 N. Y. 186. But in New York permanent damages may be imposed in equity as a condition of withholding an injunction, where the defendant has the right of eminent domain. Pappenheim *v.* M. E. Ry. Co., 128 N. Y. 436. See, generally, Charles T. McCormick, Damages for Anticipated Injury to Land, 37 Harvard Law Review, p. 574; Note, Continuing and Permanent Nuisances, 9 Columbia Law Review, p. 538.

at law for its loss in rental would be so onerous as to deny to it adequate relief.

Second. By the Company it is contended that the City should be enjoined because it had the power to condemn the land or its use for sewage purposes. The City questions the existence of that power. We have no occasion to determine this issue of Missouri law. Possession of the right of condemnation would afford added reason why compensation should be substituted for an injunction.[5] See *Osborne* v. *Missouri Pacific Ry.*, 147 U. S. 248, 259; *Winslow* v. *Baltimore & Ohio R. R. Co.*, 188 U. S. 646, 660; *Kamper* v. *City of Chicago*, 215 Fed. 706, 708; *Woodlawn Trust & Savings Bank* v. *Drainage District No. 2*, 251 Fed. 568, 570.

Third. By the City it is contended that under the Missouri law a permanent nuisance was created when the disposal plant was installed in 1923; that the cause of action therefor accrued then to the Company's grantor; that this cause of action did not pass to the Company, and, indeed, has been barred by the statute of limitations; and that, hence, both injunction and damages should be denied. We have no occasion to determine the scope of the doctrine of permanent nuisance as applied in Missouri;[6] nor need we consider to what extent the local law on that subject would be accepted as controlling in the federal courts. This nuisance has at all times been removable by the device of secondary treatment of the sewage. It may be hereafter abated at any time by the State health authorities requiring such treatment. The City may itself conclude that this should be done in the public interest, financial or otherwise. Being so terminable, pollution of the creek cannot be deemed to be a permanent nuisance as of the date of the installation of the disposal plant in 1923.

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[5]Compare Hulbert *v.* California Portland Cement Co., 161 Calif. 239, 245; Hennessy *v.* Carmony, 50 N. J. Eq. 616, 621; Rhyne *v.* Flint Mfg. Co., 182 N. C. 489, 492.

[6]The doctrine of permanent nuisance has been applied in some cases by the Missouri courts. Smith *v.* Sedalia, 244 Mo. 107; Blankenship *v.* Kansas Explorations, 325 Mo. 998. It has been held, as a corollary, that the cause of action is single and arises at the time of the first injury, and that the statute of limitations runs from that date. De Grefroy *v.* Merchants Bridge Terminal Ry., 179 Mo. 698, 720-721; Kent *v.* City of Trenton, 48 S. W. (2d) 571; see also Hayes *v.* Railroad, 177 Mo. App. 201, 217. Compare Powers *v.* Council Bluffs, 45 Iowa 652; Virginia Hot Springs Co. *v.* McCray, 106 Va. 461.

The decree is reversed and the cause remanded to the District Court for further proceedings to determine the depreciation in value of the property on account of the nuisance, and to enter a decree withholding an injunction if such sum be paid within the time to be fixed by that court.

Reversed and remanded.

A true copy.

Test:

Clerk, Supreme Court, U. S.